

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1940 *1941*

No. 584 *14*

COMMERCIAL MOLASSES CORPORATION,  
PETITIONER,

vs.

NEW YORK TANK BARGE CORPORATION, AS  
CHARTERED OWNER OF THE TANK BARGE  
"T. N. No. 73"

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED NOVEMBER 20, 1940.

CERTIORARI GRANTED DECEMBER 16, 1940.



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[fol. 1]

**IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK**

A 117-95

In the Matter of The Petition of NEW YORK TANK BARGE CORPORATION, as chartered owner of the Tank Barge "No. 73", for exoneration from or limitation of liability.

**DOCKET ENTRIES**

Feb. 16/38. Filed Petition.

Feb. 16/38. Filed Stipulation for costs (\$250 W. H. Baldwin and A. Kaufman).

Feb. 17. Filed Restraining order Bondy, J.

Feb. 17. Filed Order of reference for appraisal Godfrey Updike, Esq. Commissioner. Bondy, J.

Feb. 17. Filed Order appointing Godfrey Updike, Esq., Commissioner to receive proofs of claims and directing the issuance of monition. Bondy, J.

Feb. 18. Filed issued monition Ret. 3 29/38.

Mar. 29. Filed Monition with marshal's return all persons duly cited—Proc. made—defaults noted.

Mar. 29. Filed Consent and order extending time of Commercial Molasses Corp. et ano. to file claim to April 12, 1938. Patterson, J.

[fol. 2] Apr. 13/38. Filed Consent and order extending time of Commercial Molasses Corp. et ano. to file claim to April 22/38. Cox, J.

Apr. 22. Filed Consent and order extending time of Commercial Molasses Corp. et ano. to file claim to April 29/38. Leibell, J.

Apr. 29. Filed Answer of Commercial Molasses Corp.

Apr. 29. Filed Stipulation for costs (\$250 Ind. Ins. Co. of N. A.).

May 12. Filed Commissioner's report.

May 13. Filed Order noting defaults. Leibell, J.

June 21. Filed Petitioner's answers and exceptions to interrogatories.

Sept. 22. Filed Note of issue to sustain exceptions Ret. 9/27/38.

Sept. 23. Filed Note of issue to overrule exceptions Ret. 9/27/38.

Sept. 27. Filed Notice of hearing on exceptions to interrogatories—Memorandum endorsed sustained as to 1—Denied as to others. Coxe, J.

Oct. 4. Filed Order on interrogatories to interrogatories. Coxe, J.

Oct. 26. Before Leibell, J. Trial begun.

Oct. 27. Before Leibell, J. Trial continued.

Oct. 28. Before Leibell, J. Trial continued and concluded.

Feb. 25/39. Filed Memorandum  $\pm$ 12,019. Leibell, J. Additional testimony to be taken.

[fol. 3] Apr. 27/39. Filed Opinion  $\pm$ 12,160. Leibell, J. Petitioner granted exoneration from liability, etc.

May 15. Filed Bill of costs and taxation for \$276.79.

May 22. Filed Two (2) stipulations extending time to submit findings of fact.

May 22. Filed Final decree—limitation of liability is denied—Petitioner exonerated from all liability—neither side to recover costs. Leibell, J. (Also see memo. end.) Leibell, J.

May 22. Filed Findings of fact and conclusions of law.

Aug. 17. Filed Notice and order allowing appeal. Conger, J.

Aug. 17. Filed Assignment of errors.

Aug. 21. Filed Cross assignment of errors.

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## IN UNITED STATES DISTRICT COURT

PETITION OF NEW YORK TANK BARGE CORPORATION—Filed  
February 16, 1938

To the Honorable Judges of the United States District Court  
for the Southern District of New York:

The Petition of New York Tank Barge Corporation, as chartered owner of the tank barge "T. N. No. 73", in a cause of exoneration from or limitation of liability, civil and maritime, alleges on information and belief as follows:

First: At all the times hereinafter mentioned New York Tank Barge Corporation was and still is a corporation [fol. 4] existing under the laws of the State of New York, and was the chartered owner of the tank barge "T. N. No. 73".

Second: The "T. N. No. 73" was a tank barge approximately 168 feet long, 38 feet wide, and 8 feet deep, equipped for the carriage of liquid cargoes, including molasses. At all the times hereinafter mentioned up to the sinking of the said barge "T. N. No. 73", on October 24th, 1937, the said barge was in all respects tight, staunch, strong and seaworthy, fully manned and equipped, and in all respects fitted for the service on which she was engaged.

Third: On the evening of October 23, 1937, at about 8.30 o'clock, the "T. N. No. 73" made fast alongside the M/S "Athelsultan" at Pier 1, Hoboken, N. J., in order to receive a load of molasses from the "Athelsultan". The "T. N. No. 73" was made fast properly to the "Athelsultan" and the "Athelsultan's" discharging hose was coupled properly to the receiving equipment of the barge, and the "Athelsultan" then commenced to pump molasses into the "T. N. No. 73" shortly after 9 P. M. At that time and thereafter during the loading of the "T. N. No. 73", there were on board of her in charge of her loading operations a competent and experienced master and a competent and experienced mate. Shortly after 1.00 A. M. on the morning of October 24th, as the loading of the "T. N. No. 73" was nearing completion, her stern end suddenly became submerged and she sank stern first, parting the mooring lines between her and the "Athelsultan". The said sinking occurred so quickly that there was nothing which the men on board of the "T. N. No. 73" could do to save the said barge and her cargo.

Fourth: Your petitioner employed competent salvors in an effort to raise and save the "T. N. No. 73", and save or minimize the loss of or damage to her cargo. After the [fol. 5] "T. N. No. 73" was raised and placed on drydock, a careful survey disclosed that there was no evidence of any unseaworthiness or leakage to account for the sinking, and the only possible conclusion is that the sinking was caused by water getting into the barge through deck or hatch openings at the time when her stern end became submerged. The aforesaid survey after the "T. N. No. 73" was raised also disclosed that by reason of the sinking and by reason of the injuries which the hull had unavoidably received in the course of salvaging operations, the wreck of the "T. N. No. 73" was not worth repairing, and the said wreck was subsequently sold as scrap for the highest priced offer, which

was \$800. The said proceeds of the sale of the wreck were less than and insufficient to cover the charges which petitioner had incurred and paid for the aforesaid salvage operations.

Fifth: The aforesaid sinking of the "T. N. No. 73" was due either to causes for which the petitioner was not and is not responsible, or to inattention and improper care by the master and mate of the said barge in their supervision of the loading of the cargo of molasses into the said barge, or their supervision of the mooring lines by which the said barge was made fast to the "Athelsultan".

Sixth: The sinking and loss of the "T. N. No. 73" and any and all damages resulting therefrom occurred without the privity or knowledge of the petitioner.

Seventh: Claim has already been presented against the petitioner by North Atlantic Terminal Service, Inc., No. 1 Broadway, New York City, N. Y., as operator of Pier 1, Hoboken, N. J., for alleged damages because of obstruction of the berth at the said dock during the time that the "T. N. No. 73" lay there in a sunken and submerged condition. Your petitioner is also informed and believes that [fol. 6] the cargo of molasses which was on board the "T. N. No. 73" at the time of the aforesaid sinking received serious and substantial damage as the result of the said sinking; and your petitioner believes that the owner or owners of the said cargo may hereafter present a claim for the said damage.

Eighth: By reason of the sinking of the "T. N. No. 73" before the completion of the loading of her cargo of molasses and her consequent failure to make delivery of the said cargo, no freight was earned or pending at the time of the said sinking.

Ninth: By reason of the premises the entire aggregate value of the interest of the petitioner in the "T. N. No. 73" and any pending freight as of the time of the said sinking on the early morning of October 24th, 1937, was nil.

Tenth: Petitioner claims exemption from liability as owner of the "T. N. No. 73" for any and all losses, damages, injuries and destruction occasioned or incurred by the sinking of the "T. N. No. 73" aforesaid, and for the claims

for damage that have been made or hereafter may be made; and it alleges that it has a valid defense to all such claims, but if this court shall adjudge that the petitioner is liable to any extent in the premises then the petitioner claims the benefit of the limitation of liability provided for in Sections 4283, 4284, and 4285 of the Revised Statutes of the United States and the various statutes amendatory thereof and supplementary thereto.

Eleventh: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[fol. 7] Wherefore, petitioner prays:

(1). That the Court will cause due appraisement to be made of the amount or value, if any, of petitioner's interest in the "T. N. No. 73" and her pending freight upon a reference to be ordered herein.

(2). That the Court will make an order directing the issuance of a monition to all persons claiming damages for any and all loss, damage, or injury caused by or resulting from the sinking of the "T. N. No. 73" on October 24, 1937, aforesaid, citing them and each of them to appear before a commissioner to be named by the Court in said order, and make due proof of their respective claims, and also to appear and answer the allegations of this petition according to the law and practice of this Court, at or before a certain time to be fixed by the monition.

(3). That the Court will issue its injunction restraining the prosecution of all actions or suits now pending against the petitioner and the commencement or prosecution hereafter of any suit, action, or legal proceeding of any nature or description whatever against the petitioner except in the present proceeding in respect of any claim or claims arising out of the sinking of the "T. N. No. 73", as aforesaid.

(4). That the Court will adjudge that petitioner is not liable to any extent for any loss, damage, or injury nor for any claim whatsoever in any way arising out of the sinking of the "T. N. No. 73", aforesaid; but if this Court shall adjudge that the petitioner is liable in any respect, then that the liability of the petitioner be limited to the amount or value, if any, of the petitioner's interest in the "T. N. No. 73" and her pending freight; and that the Court

will adjudge that the said interest of the petitioner in the [fol. 8] said barge and pending freight is nil; and that a decree may be entered discharging the petitioner from all further liability.

(5). That the petitioner may have such other and further relief as may be just.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Petitioner, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

(Verified by Sam H. Liplutz, as President, on February 11, 1938.)

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IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 29, 1938

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The Answer of Claimant, Commercial Molasses Corporation to the petition of New York Tank Barge Corporation, as chartered owner, and tank barge "T. N. No. 73", in a cause of exoneration from or limitation of liability, civil and maritime, alleges, upon information and belief, as follows:

First: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Article "First" of the petition herein.

[fol. 9] Second: Denies each and every allegation contained in Article "Second" of the petition herein, except that it admits that the "T. N. No. 73" was a tank barge approximately 168 feet long, 38 feet wide and 8 feet deep.

Third: Denies each and every allegation contained in Article "Third" of the petition, except as the same are hereinafter expressly admitted or modified in Article "Twelfth" of this answer.

Fourth: Denies each and every allegation contained in Article "Fourth" of the petition herein, except that it admits that the wreck of the "T. N. No. 73" was not worth

repairing and that it was subsequently sold for scrap for \$800.00, the said proceeds of the sale being insufficient to cover the charges incurred by petitioner in the salvage operations.

Fifth: Denies each and every allegation contained in Article "Fifth" of the petition herein.

Sixth: Denies each and every allegation contained in Article "Sixth" of the petition herein.

Seventh: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Article "Seventh" of the petition herein, except that it admits that the cargo of molasses on board the "T. N. No. 73" after the sinking, received serious and substantial damage, and that the owner thereof is claiming for the said damage.

Eighth: Admits each and every allegation contained in Article "Eighth" of the petition herein.

Ninth: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Article "Ninth" of the petition herein.

[fol. 10] Tenth: Denies each and every allegation contained in Article "Tenth" of the petition herein.

Eleventh: Denies each and every allegation contained in Article "Eleventh" of the petition herein, except that it admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Claimant further answering and for a separate and distinct defense, alleges, as follows:

Twelfth: That on or about October 23, 1937, pursuant to arrangements with the petitioner of long standing known to and authorized by the officers and managing agents of the petitioner, the claimant notified the petitioner, New York Tank Barge Corporation, of the arrival of the M/S "Athel-sultan" at Pier 1, Hoboken, New Jersey, with a cargo of molasses consigned to the claimant, Commercial Molasses Corporation, and agreed with the petitioner, New York Tank Barge Corporation for the transportation of the said molasses to claimant's plant at Baldwin Avenue, Weehawken, N. J., at an agreed rate of 1/10¢ per gallon, in

consideration of which rate petitioner agreed to transport safely claimant's molasses in tank barges which it warranted in all respects, to be seaworthy and in all respects fitted and suitable for the safe carriage of claimant's cargo.

That pursuant to said agreement, the petitioner, New York Tank Barge Corporation, sent the tank barge "T. N. No. 73" on the evening of October 23, 1937, to Pier 1, Hoboken, New Jersey, in order to receive a portion of the cargo of molasses from the M/S "Athelsultan" and to transport the same to claimant's plant as aforesaid.

That pursuant to said agreement, 165,042 gallons of claimant's molasses were pumped from the M/S "Athelsultan" into petitioner's tank barge "T. N. No. 73."

[fol. 11] That claimant, Commercial Molasses Corporation, has fully and duly performed all of the terms and provisions of the contract of carriage required by it to be performed, but the petitioner, New York Tank Barge Corporation, has failed to carry safely and securely claimant's said molasses delivered into its tank barge "T. N. No. 73", but on the contrary, before the loading of the said tank barge "T. N. No. 73" was entirely completed, the said tank barge "T. N. No. 73" sank with the claimant's molasses on board thereof, by reason of unseaworthiness of said barge, with the result that a great portion thereof was lost and the remainder thereof substantially damaged, all in breach and violation of petitioner's contract and warranty aforesaid.

Wherefore, claimant prays that the petition be dismissed.

Bigham, Englar, Jones & Houston, Proctors for  
Claimant, Commercial Molasses Corporation.

(Verified by Benjamin H. Ticknor, II, as Vice-President,  
on April 26, 1938.)

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#### IN UNITED STATES DISTRICT COURT

#### INTERROGATORIES PROPOUNDED TO PETITIONER TO BE ANSWERED UNDER OATH

First Interrogatory: State the time at which it was first observed that the barge "T. N. No. 73" was sinking.

Second Interrogatory: State what steps were taken to obtain assistance for the barge "T. N. No. 73" and at what time such steps were taken.

[fol. 12] Third Interrogatory: State the time at which the barge "T. N. No. 73" finally settled on the bottom.

Fourth Interrogatory: State the size, arrangement and capacity of the cargo tanks of the barge "T. N. No. 73".

Fifth Interrogatory: Describe in detail the method used in transferring claimant's molasses from the steamship "Athelsultan" to the cargo tanks of the barge "T. N. No. 73", including detailed description of the arrangement of the piping used for this purpose.

Sixth Interrogatory: State the amount of molasses cargo which had been received into each of the tanks of the barge "T. N. No. 73" at the time it was discovered that the barge "T. N. No. 73" was sinking and state whether these tanks were filled separately or simultaneously, and, if separately by stages, describe the method of loading with respect to the quantity of cargo received in each tank in detail.

Seventh Interrogatory: Describe in detail the arrangement and dimensions of the buoyancy compartments or dry spaces of the barge "T. N. No. 73" and the means by which these spaces were separated from cargo tanks or other spaces.

Eighth Interrogatory: State what deck openings or hatches there were on the deck of the barge "T. N. No. 73", the arrangement, location, dimensions and means of covering each, stating which were open and which were closed or covered at the time it was discovered that the barge "T. N. No. 73" was sinking.

Ninth Interrogatory: State in detail what inspections had been made of the barge "T. N. No. 73" during the period of one year prior to October 23, 1937.

[fol. 13] Tenth Interrogatory: State what repairs had been made to the barge "T. N. No. 73" during the period of one year prior to October 23, 1937, the extent, nature and cost of such repairs and the reason for the same.

Eleventh Interrogatory: Set forth in full the contract between the petitioner, New York Tank Barge Corporation, and the owner of tank barge "T. N. No. 73", by virtue of which it is claimed that the petitioner, New York Tank Barge Corporation, was chartered owner of tank barge "T. N. No. 73".

Twelfth Interrogatory: Set forth in detail the contract between the petitioner, New York Tank Barge Corporation, and this claimant, Commercial Molasses Corporation, for transportation of claimant's cargo of molasses ex S. S. "Athelsultan" to claimant's plant at Weehawken, New Jersey, by virtue of which barge "T. N. No. 73" received on board claimant's cargo on October 23, 1937, stating by, between whom, and when said contract was made and by, between whom, and when arrangements for transportation of this particular cargo was arranged.

Thirteenth Interrogatory: State whether it will be claimed that the sinking of the barge "T. N. No. 73" was due to causes for which the petitioner was not and is not responsible. If so, state in detail what were the causes of the sinking of the barge "T. N. No. 73" for which it will be claimed the petitioner was not and is not responsible.

Fourteenth Interrogatory: State whether it will be claimed that the sinking of the barge "T. N. No. 73" was due to inattention and improper care by the master and mate of the said barge in their supervision of the loading of the cargo of molasses into the said barge, or their supervision of the mooring lines by which the said barge was [fol. 14] made fast to the "Athelsultan". If so, state in detail in what respects it will be claimed that there was inattention and improper care by the master and mate of the said barge.

Bigham, Englar, Jones & Houston, Proctors for  
Claimant, Commercial Molasses Corporation.

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#### IN UNITED STATES DISTRICT COURT

#### PETITIONER'S ANSWERS AND EXCEPTIONS TO CLAIMANT'S INTERROGATORIES—Filed June 21, 1938

New York Tank Barge Corporation, the above-named petitioner, by Kirlin, Campbell, Hickox, Keating & McGrath, answering the interrogatories propounded to it by the claimant, Commercial Molasses Corporation, alleges on information and belief as follows:

Answering the first interrogatory: The persons in charge of the "T. N. No. 73" first observed that she was sinking

at approximately a few minutes after 1:00 A. M. on October 24th, 1937.

Answering the second interrogatory: The persons in charge of the "T. N. No. 73" immediately endeavored to obtain assistance from the M/S "Athelsultan", the vessel from which the "No. 73" was receiving the load of molasses, by requesting the officers of said vessel to endeavor to pump the molasses back out of the "T. N. No. 73" into the "Athelsultan"; but were advised that that could not be [fol. 15] done because the vessel's pump was not equipped to do it. In view of the submerged condition of the "T. N. No. 73" it was impossible to obtain any other assistance for her.

Answering the third interrogatory: The stern of the "T. N. No. 73" apparently settled on the bottom approximately ten minutes after it was first observed that she was sinking. The mooring lines from the bow of the "T. N. No. 73" to the "Athelsultan" apparently held the bow of the barge off the bottom until approximately 6 A. M. on October 24th, 1937, when the barge settled on the bottom along her entire length.

Answering the fourth interrogatory: The "T. N. No. 73" is a regular deep tank single skin barge, equipped with fore and aft peaks. The cargo space is approximately 125-130 feet long, 38 feet wide, and less than 8 feet deep. The said cargo space is divided into four compartments by one longitudinal and one athwartships bulkhead. The various types of cargoes carried by the "T. N. No. 73" and by other similar tank barges vary in respect to weights and densities, and there is a similar variation even in cargoes of the same commodity. On each occasion, when the said barge was loaded, the experienced persons in charge of her determined when she had a proper load by observation of her free-board; and the persons in charge of her and this petitioner did not know and had no means of knowing the exact quantity of cargo on board at the time of any of the said loadings.

Answering the fifth interrogatory: Molasses was being pumped on board the "T. N. 73" by the "Athelsultan". It was being received on the "T. N. No. 73" through the barge's 8 inch hose. The said hose was connected with the [fol. 16] four cargo compartments by means of the usual

pipng, the inlet into each cargo compartment being controlled by a ~~separate~~ valve.

Answering the sixth interrogatory: On the occasion in question the "T. N. No. 73" first received the molasses from the "Athelsultan" in her two forward cargo compartments, and when these compartments were only partly filled, the intake valves leading into them were shut off, and the valves were opened into the two stern cargo compartments of the "T. N. No. 73", and she was receiving molasses in her two stern cargo compartments at the time when it was discovered that she was sinking. The petitioner does not know and has no means of knowing how much molasses had been loaded into any one of the cargo compartments up to the time of the sinking.

Answering the seventh interrogatory: The "T. N. No. 73" was equipped with fore and aft peak tanks, separated from the cargo spaces by water-tight bulkheads. The said peak tanks extended across the width of the barge 38 feet, and extended downward from underneath the deck to the upper side of the bottom. They were accordingly approximately 15 feet long, 38 feet wide, and less than 8 feet deep.

Answering the eighth interrogatory: The "T. N. No. 73" was equipped with four deck openings, or hatches. On each side of the barge, spanning the athwartships bulkhead, there was a hatch approximately 2' wide x 5' long. On the forward end and on the stern end, spanning the longitudinal bulkhead, there was a hatch about 4 feet square. All of the said hatches were of ordinary and proper construction, and were equipped with gaskets and dogs. During the loading up to [fol. 17] the time of the sinking the side hatches and the stern hatch were closed, but were not dogged.

Answering the ninth interrogatory: The "T. N. No. 73" was drydocked for inspection and repairs on May 27th, 1937, and was inspected at the same time for reinsurance. The said barge was regularly inspected by the petitioner's Port Captain at monthly intervals, and was under the constant supervision and inspection of the captain and mate on board. On October 23rd, 1937, before the barge commenced to receive the load of molasses which she was receiving at the time she sank, she was inspected by a surveyor on behalf of cargo interests, who reported the barge to be

tight and seaworthy and fit for the receipt of the said load of molasses.

Answering the tenth interrogatory: All necessary routine repairs were made to the "T. N. No. 73" at the time of her drydocking from May 27th to June 4th, 1937.

The petitioner hereby excepts to claimant's Eleventh, Twelfth, Thirteenth and Fourteenth Interrogatories, on the grounds, amongst others, that the matters referred to in those interrogatories are matters as to which the petitioner has the burden of proof; that they are not matters necessary to claimant's case; and that said interrogatories constitute a "fishing excursion" on the part of the claimant.

Kirlin, Campbell, Hickox, Keating & McGrann,  
Proctors for Petitioner, Office & P. O. Address, 120  
Broadway, Borough of Manhattan, New York City.

(Verified by Albert Kaufman, as Secretary, on June 16, 1938.)

[fol. 18] IN UNITED STATES DISTRICT COURT

CLAIM OF COMMERCIAL MOLASSES CORPORATION

The claimant, Commercial Molasses Corporation, hereby appears and makes claim against the petitioner, New York Tank Barge Corporation, as chartered owner of the tank barge "No. 73" in this proceeding, as follows:

First: At all of the times hereinafter mentioned, the claimant, Commercial Molasses Corporation, was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and place of business located at 230 Park Avenue, in the Borough of Manhattan, City, County and State of New York.

Second: At all of the times hereinafter mentioned, the New York Tank Barge Corporation was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and was the chartered owner of the tank barge "T. N. No. 73".

Third: That on or about October 23, 1937, pursuant to arrangements with the petitioner of long standing known to and authorized by the officers and managing agents of the

petitioner, the claimant notified the petitioner, New York Tank Barge Corporation, of the arrival of the M/S "Athelsultan" at Pier 1, Hoboken, New Jersey, with a cargo of molasses consigned to the claimant, Commercial Molasses Corporation, and agreed with the petitioner, New York Tank Barge Corporation for the transportation of the said molasses to claimant's plant at Baldwin Avenue, Weehawken, N. J., at an agreed rate of 1/10¢ per gallon, in consideration of which rate petitioner agreed to transport safely [fol. 19] claimant's molasses in tank barges which it warranted in all respects, to be seaworthy and in all respects fitted and suitable for the safe carriage of claimant's cargo.

Fourth: That pursuant to said agreement, the petitioner, New York Tank Barge Corporation, sent the tank barge "T. N. No. 73" on the evening of October 23, 1937, to Pier 1, Hoboken, New Jersey, in order to receive a portion of the cargo of molasses from the M/S "Athelsultan" and to transport the same to claimant's plant as aforesaid.

Fifth: That pursuant to said agreement, 165,042 gallons of claimant's molasses were pumped from the M/S "Athelsultan" into petitioner's tank barge "T. N. No. 73".

Sixth: That claimant, Commercial Molasses Corporation, has fully and duly performed all of the terms and provisions of the contract of carriage required by it to be performed, but the petitioner, New York Tank Barge Corporation, has failed to carry safely and securely claimant's said molasses delivered into its tank barge "T. N. No. 73", but on the contrary, before the loading of the said tank barge "T. N. No. 73" was entirely completed, the said tank barge "T. N. No. 73" sank with the claimant's molasses on board thereof, by reason of unseaworthiness of said barge, with the result that a great portion thereof was lost and the remainder thereof substantially damaged, all in breach and violation of petitioner's contract and warranty aforesaid.

Seventh: By reason of the premises, your claimant has sustained damages in the sum of Thirteen Thousand and 00/100 (\$13,000.00) Dollars, as nearly as the same can now be estimated, no part of which has been paid, although duly demanded.

[fol. 20] Wherefore, claimant presents this claim and prays that the said claim be approved and allowed by the said court with interest and costs, and for such other and further relief as to the Court may seem just and proper.

Bigham, Englar, Jones & Houston, Proctors for  
Claimant, Commercial Molasses Corporation.

(Verified by Benjamin H. Ticknor II, as Vice-President,  
on April 26, 1938.)

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IN THE UNITED STATES DISTRICT COURT

NOTICE OF OBJECTION TO ALLOWANCE OF CLAIM

. . . . .

SIRS:

Please take notice that the petitioner herein objects to the allowance of the claim filed in this case by or on behalf of Commercial Molasses Corporation, and prays that the said claim may be disallowed and excluded unless established by further legal proof upon notice to the proctors for the petitioner and otherwise in the manner provided by law.

Dated, New York, April 29, 1938.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Petitioner, Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 21] To:

Bigham, Englar, Jones & Houston, Esqs., Proctors for Claimant, 99 John Street, New York.

Charles Weiser, Esq., Clerk of the above-named Court.

Godfrey E. Updike, Esq., Commissioner, 608 Fifth Avenue, Borough of Manhattan, City of New York.

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IN UNITED STATES DISTRICT COURT

ORDER OF LEIBELL, D. J., NOTING DEFAULT—May 11, 1938

. . . . .

This Court having duly issued a monition dated February 18, 1938 against all persons claiming damage for any loss,

damage, injury or destruction arising out of or occurring from the sinking of the "T. N. No. 73" on October 24, 1937 at Pier 1, Hoboken, N. J., citing them to appear before this Court on the 29th day of March, 1938, at 10.30 o'clock in the [fol. 22] forenoon of that day and to answer the libel and petition in this case and to make proofs of their claims at or before the said time before Godfrey Updike, Esq., the Commissioner designated by this Court, at his office, No. 608 Fifth Avenue, Borough of Manhattan, City of New York, and public notice of said monition having been duly given and published as required by law pursuant to the rules and practice of this Court, all of which appears by the return of the Marshal duly made, and the said Godfrey Updike, Esq., the Commissioner as aforesaid, having duly made and filed his report whereby it appears that the following claim has been presented to him pursuant to said monition, to wit:

Claim of Commercial Molasses Corporation in the sum of \$13,000.,

and no further claims having been presented, and no one having appeared and filed answer to the libel and petition herein except the said Commercial Molasses Corporation, and upon the return of said monition proclamation having been made citing all persons claiming damages for any and all losses, damage or injury as aforesaid to appear and answer the libel herein and to present their claims,

Now, on motion of Kirlin, Campbell, Hickox, Keating & McGrann, proctors for the petitioner, it is

Ordered that the default of all persons claiming damage for any losses, damages or injuries arising out of or occasioned by the sinking of the "T. N. No. 73" on October 24, 1937 at Pier 1, Hoboken, N. J., as aforesaid, for not having made answer to the petition and libel as aforesaid, be and it hereby is noted except as to Commercial Molasses Corporation.

Vincent L. Leibell, U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER OF COXE, D. J., AS TO INTERROGATORIES—October 3,  
1938

• • • • •

A motion having regularly come on to be heard by this Court on the 27th day of September, 1938, for an order overruling petitioner's exceptions to certain interrogatories, propounded by claimant, and Charles A. Van Hagen, Jr., having been heard in support of said motion, and Robert Erskine having been heard in opposition to said motion and, after due deliberation, the Court having overruled the exception to Interrogatory "Eleventh" and having sustained the exception to Interrogatories numbered "Twelfth", "Thirteenth" and "Fourteenth", it is

Now, on motion of Bigham, Englar, Jones & Houston, proctors for the claimant

Ordered that the petitioner's exception to the "Eleventh" Interrogatory be and the same hereby is overruled, and it is further

Ordered that the petitioner's exceptions to the "Twelfth", "Thirteenth" and "Fourteenth" interrogatories be and they hereby are sustained, and it is further

Ordered that the petitioner be and he hereby is directed to answer under oath the "Eleventh" Interrogatory, propounded by claimant, within three weeks from the date of the service of this order with notice of entry on the proctors for the petitioner.

Alfred C. Coxe, U. S. D. J.

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[Vol. 24] IN UNITED STATES DISTRICT COURT

COMMISSIONER'S REPORT

To the District Court of the United States for the Southern District of New York:

I, Godfrey Updike, the Commissioner named in the order of this Court made in this proceeding on the 16th day of February, 1938, directing that a monition issue against all persons claiming damages for any loss, damage, injury or destruction arising out of or occurring from the sinking of the Tank Barge "T. N. No. 73" on October 24, 1937, citing them to appear before this Court, and make due proof of their respective claims before me as Commissioner on or before the 29th day of March, 1938, the time for making of such proof having been extended by order of this Court, dated April 12, 1938, to 3:30 o'clock in the afternoon of

April 22nd, 1938, and thereafter again extended by order of this Court, dated April 22nd, 1938, to 3:30 o'clock in the afternoon of April 29th, 1938, do hereby report that the following claim has been presented by or on behalf of the Company hereinafter named:

Commercial Molasses Corporation for \$13,000.00

The above claim, and the objection thereto, are submitted and filed with this report and form a part hereof.

Dated New York, May 11, 1938.

Respectfully submitted, Godfrey Updike, Commissioner.

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[fol. 25] IN UNITED STATES DISTRICT COURT

### **Statement of Evidence**

Before Hon. Vincent L. Leibell, District Judge

New York, October 26, 1938

#### **APPEARANCES:**

Messrs. Kirlin, Campbell, Hickox, Keating & McGrann,  
Proctors for the Petitioner; Robert S. Erskine, Esq.,  
of Counsel.

Messrs. Bigham, Englar, Jones & Houston, Proctors for  
the Claimant; Leonard J. Matteson, Esq., of Counsel.

#### **COLLOQUY BETWEEN COURT AND COUNSEL**

The Court: Do you wish to make a short opening statement?

Mr. Erskine: This is a proceeding for limitation of liability. The petitioner is the chartered owner of the Tank Barge "T. N. 73". That barge was loading a contract of molasses alongside of a ship at Pier 1, Hoboken, on the night of October 23-24, 1937. While the loading of the molasses into this tank barge was still in process, the barge commenced to sink by the stern; she continued to sink until she went to the bottom, her mooring lines finally giving way. Then she was raised. It was necessary to raise her to clear the slip, and when she was put on drydock it was found that in the course of the raising operations, as well

as through the effects of the sinking, she had sustained considerable damage and was not worth repairing, and she was sold for scrap, more or less, and the expenses were such that the limitation fund is zero.

I will offer proof that this barge had been well kept up, [fol. 26] was in fact seaworthy, and although the captain and mate on board were experienced men they would naturally, I think, tend to protect themselves to some extent in their explanation of this accident. My own personal feeling is that this accident was due to their negligence in overloading the stern tanks. That is, permitting the molasses to flow in without discovering that they were overloading the boat by the stern, and when the water came up it was able to get into the hatch covers and fill the boat up and sink her.

Our contention is that even if your Honor finds that the accident was due to the negligence of the men, that still the owner, under the limitation statute, is not guilty of any privity or knowledge on its part or any neglect which would amount to privity or knowledge, and is entitled to limit liability.

There is another point in the case which will come up on a motion to amend the petition. It was not until I was preparing the case for trial within the last three weeks that I obtained from the petitioner a document which is going to be admitted by my opponent as the contract between the molasses company and the petitioner under which these loads of molasses were carried from time to time in these barges. Now that contract was executed in 1928 and has been renewed from time to time since then without any changes except some changes in the stated rate of freight. Except for that the provisions of the contract remain the same. There is the usual provision that the barge owners undertake and agree that the barge is within the limits mentioned in the contract and will maintain the barges in such condition during the life of this contract. This, as I say, adds nothing to the implied warranty of any vessel owner as to seaworthiness and exercise of diligence to maintain the boat in good condition.

Then there was a further clause in the contract wherein it is agreed that the Dunbar, the Commercial Molasses Corporation [fol. 27] shall insure cargoes carried for it under the contract by New York Tank Barge Company, Inc. in the latter's own or chartered or operated barges, for the account of New York Tank Barge Company, Inc., and/or the

owners of said barges, and that neither the New York Tank Barge Company, Inc. nor the said barges shall be liable for any loss in respect of which insurance has been or could have been effected by the Commercial Molasses Corporation.

Mr. Matteson: This is not yet in the case.

Mr. Erskine: I am discussing it because it will have a bearing on the motion which I will make hereafter.

There will be evidence that there was insurance on this cargo which has been paid, so that by the proposed amendment I intend to set up a further defense that, even if your Honor should find that we were negligent and without the right to limit liability, still under this contract provision, the Molasses Company is barred from making this claim against us.

Mr. Matteson: If your Honor please, I represent the only claimant in this case which is the Commercial Molasses Company which was the owner of the cargo of molasses.

It will be agreed that we were properly incorporated and were the owner of the molasses, and that the molasses was placed on board the tank barge under the contract between claimant and petitioner.

This barge, according to the allegations here, sank without any explanation. A sound barge, properly laden, will not sink.

Because of the relationship of bailment between the parties and because of the circumstances of the sinking there arise presumptions against the petitioner that the cargo was lost through causes for which the petitioner is responsible. Consequently, so far as our case is concerned, we will rely on a very simple *prima facie* case, and it will then be incumbent on the petitioner to go on and show the causes, and that he was not responsible for them.

[fol. 28] In respect to the amendment which is proposed, I understand the motion has not yet been made for the amendment of the petition to set up this special defense. When that motion is made I will oppose it. This petition was filed five or six months after the disaster, after there had been adequate opportunity for investigation of all phases of the matter by the petitioner. At the time the petition was filed this particular claim was anticipated, and this was alleged, an allegation in the petition that it is expected that a claim will be filed in the proceeding for the loss of cargo. At that time there was no suggestion that there was any

special defense to this claim based on a contract. As a matter of fact, on counsel's own statement, this defense is not put forward by the petitioner of his own motion. The petitioner did not advise counsel of the existence of any such clause. It was only when the contract came into the hands of counsel shortly before the trial that he saw a chance to make something of this clause and now wishes to amend.

The Court: Do you claim surprise in reference to that proposed amendment?

Mr. Matteson: About two weeks ago Mr. Erskine advised my office of his intention to move at the trial for the inclusion of this special defense. I told him that I would take that informal notice as notice of his intention to move at the trial, so that I have had that much notice. But, it seems to me, if your Honor please, that the matter goes further than that; that the circumstances under which the motion is made and the defense is brought forward are such that it indicates that there was no such intention on the part of the parties to claim such a defense, and it is too late now to interpose it.

The Court: If the language of the contract is clear, and somebody was asleep as to what the real rights of the chartered owner of this barge were, there is no reason why the Court should not consider the terms of the contract and [fol. 29] apply them to the case. In other words, the trial of a lawsuit is a search for the truth, and all the truth, and in order to do justice we do not permit technicalities to stand in the way of a complete exposition of both sides of the allegations. I am inclined to grant motions that will enlarge the issues where there is a real basis for the submission of those issues in order that all the issues in the case may be determined.

But, if you were surprised by this application and feel you need additional time to meet it, I will consider any request you wish to make.

Mr. Matteson: I would not put it on that ground. This is the sort of a case where, as a matter of fact, I am entirely at sea and have no facts.

The Court: The contract is something that both sides have. I am inclined to grant motions that will enable the Court to completely dispose of all the issues that could properly be raised in the allegation. That is the only way to do justice.

Mr. Matteson: May I make this clear, that my view is that these causes which are sought to be injected now do not have the effect that are claimed for them, and, as a matter of fact, do not affect the issues in this case but, rather, tends to confuse the trial.

I had an experience exactly like this in trying a case before Judge Thacher a few years ago. There a storm had been encountered at sea and there was a petition for limitation of liability, there were claims for personal injuries and loss of life filed. This exact situation came up when the petitioner attempted to offer in evidence the tickets on which the passengers had been traveling, attempting to take advantage of special clauses in the ticket as a special defense to the personal injury claim. We objected to the admission of the ticket on the ground that the clause had not been pleaded. Thereupon the petitioner moved to amend the petition to include that.

[fol. 30] Judge Thacher without any motion from either side told Mr. Clark that it was too late to raise any such defense.

The Court: They were actually on trial and the question came up when the offer was made of documents as an exhibit in the case. But, as I understand it here, you were notified two weeks ago of the proposed amendment; and while I have the highest regard for Judge Thacher and his views, I think that if we read the new rules of civil procedure of the federal courts, which, of course, do not apply to admiralty cases, but, nevertheless, gives you some idea as to the manner in which the highest court looks upon procedure in litigation, I think you will finally conclude that the tendency is to do away with technicalities, especially in pleadings, and to permit amendments that will raise all the issues, but, not, of course, at the expense of the opponent who is taken by surprise. I think that is the attitude of the court today, and it is a fair attitude.

After all, why should you shut your eyes to something that you know is in existence. There is a contract. How did the barge come to be alongside of the ship? It was there under some agreement to do certain lighterage work. What is the agreement? And then the document comes forth. Why should we read some parts of the document and not all of it?

Mr. Matteson: I do not want to press my opposition too far, but I do want to make this point very clearly that I am

not afraid to meet the defense on the merits; that I am quite sure that it does not affect the issues in the case at all, and when you consider the whole contract taken together, it really does not change the issues or make any difference at all.

The Court: The interpretation of the contract is a different matter.

Mr. Matteson: It is quite evident that the parties themselves did not consider that it affected the situation, otherwise this thing would have been brought to our attention long before.

[fol. 31] The Court: Sometimes people overlook things. We all do.

Mr. Matteson: When you are faced with a \$12,000 claim I don't think you are very likely to.

#### MOTION TO AMEND PETITION

Mr. Erskine: I move to amend the petition in two respects.

The Court: Have you typed out the proposed amendments?

Mr. Erskine: I have prepared an amended petition and my motion will be to file it *nunc pro tunc*.

The Court: You wish to amend the petition. It would be better on the record.

Mr. Erskine: It is immaterial whether it is amended by the amendment I set up here or on the record. I thought it might be better to have it in an amended form.

The Court: I think it would be better for you to state your amendment on the record.

Mr. Erskine: I first move to amend by correcting in the title, in the preliminary paragraph, and in the first article, the phrase by which the petitioner is referred to as New York Tank Barge Corporation and substitute in place of that phrase the correct corporate title, "New York Tank Barge Co. Inc."

Mr. Matteson: I have no objection to that amendment, if your Honor please.

Mr. Erskine: Now the other amendment: I move to make the original eleventh paragraph Paragraph No. 12. That is the concluding paragraph of the jurisdiction of the court, and inserting as a new Paragraph 11 the following:

"Eleventh: The molasses which was on board or being loaded on board the "T. N. No. 73" at the time of the sink-

ing heretofore described in this petition and which was damaged or lost as a result of said sinking, was being carried by New York Tank Barge Company, Inc., for Commercial Molasses Corporation under the terms of a private contract of carriage between said parties; and under the [fol. 32] expressed terms of the said contract said Commercial Molasses Corporation contracted and agreed to insure cargoes carried for it thereunder by New York Tank Barge Company, Inc. in the latter's own or chartered or operated barges, for the account of New York Tank Barge Company, Inc., and/or the owners of said barges, and further contracted and agreed that neither New York Tank Barge Company, Inc. nor the said barges should be liable for any loss in respect of which insurance has been or could have been effected by said Commercial Molasses Corporation. The damage or loss to the molasses which was on board or being loaded on board the "T. N. No. 73" under the aforesaid contract for the account of Commercial Molasses Corporation at the time of the sinking heretofore described in this petition was a damage or loss in respect of which insurance could have been effected, and your petitioner believes that in fact the said damage or loss was covered by insurance which has been effected by Commercial Molasses Corporation. By reason thereof neither the petitioner herein nor the "T. N. No. 73" is under any liability to Commercial Molasses Corporation with respect to the said damage to or loss of molasses."

Mr. Matteson: I object to that on the grounds that I have stated.

The Court: Very well. The motion to amend is granted.

Mr. Matteson: If your Honor please, is it a rule of this court that we should submit memoranda at the opening of the trial?

The Court: Well, I have had the Clerk insert at the head of the trial calendar a request for briefs in advance of the trial. Most of the time I get them; sometimes I do not. I have received a brief from the petitioner in this case two days ago. Have you a brief ready?

Mr. Matteson: Yes, sir, I have.

The Court: I will look at it.

Mr. Matteson: I will be glad to submit this. Your Honor [fol. 33] will understand my situation, I am in entire ignorance as to the facts so my initial memorandum has to do

with the presumptions I am entitled to rely on. And I also have another memorandum with respect to the proper interpretation of the contract.

The Court: Have you any memorandum on that phase of the case, Mr. Erskine?

Mr. Erskine: I thought that would be a matter to be proved and submitted at the end.

The Court: All right. I know you state in your memorandum you intend to move to amend in respect to that clause in the contract.

Mr. Matteson: Are we to exchange these memoranda?

The Court: Yes, if you wish.

WILLIAM H. BALDWIN, JR., called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. Mr. Baldwin, what is your connection with the New York Tank Barge Company, Inc.?

A. I am the president.

Q. How long have you been president of that company?

A. Since 1924.

Q. And in a general way in what type of business is that company engaged?

A. In the handling of bulk vegetable oils and molasses in tank barges.

Q. Were you acquainted with the barge "T. N. 73"?

A. Yes, sir.

Q. Do you recall this matter of her sinking in October, 1937?

A. I do.

Q. At that time, and previously to the sinking, what was the connection, if any, between the New York Tank Barge Company, Inc. and the barge?

A. We were charterers.

[fol. 34] Q. Who was the owner of the barge?

A. The Manhattan Tank Barge Company.

Q. Approximately how long had the New York Tank Barge Company chartered the barge from the Manhattan Company?

A. From 1926, on or about the 3rd of July, 1926.

Q. Will you tell us the terms under which the New York Tank Barge Company, Inc. chartered the barge in respect to operation, hire, and so forth.

A. It was on a bare boat basis, the Manhattan Tank Barge only paid the insurance on the barge, all wages and equipment and accessories were paid by the New York Tank Barge.

Q. Did the New York Tank Barge pay charter hire?

A. Yes, sir.

Q. On what basis, monthly or yearly?

A. Based on a monthly basis.

Q. An agreed hire per month?

A. That is right.

Q. Do you know of your own knowledge that during the period that the "T. N. 73" was under charter up to the time of her sinking that your corporation did in fact pay the wages to the men and supply the barge?

A. I do.

Q. Were you or any other officer of the New York Tank Barge Company present at the time of this disaster on October 23-24, 1937?

A. No, there was not.

Q. Have you any blueprints or plans of the "T. N. 73", or any plans showing her exact measurements and layout?

A. I have not.

Q. Have you made inquiry as to whether or not the owner has any?

A. They have not any.

Q. Do you know from whom the Manhattan purchased this "T. N. 73" or from what district it was purchased?

A. It was bought in Tampico, Mexico, in 1925—the purchase was made late in 1924 and the barge arrived here in April, 1925.

Q. Have I requested of you a production of any plan or other papers showing the dimensions and capacity of the tanks of the barge "T. N. 73"?

A. You have.

[fol. 35] Q. And do you recognize these four photostat sheets I show you?

A. Yes, sir. That is a gauge chart of the gallon capacity.

Q. What are those figures roughly?

A. That is a calibration table.

Q. Do you know who prepared this calibration table?

A. Gebauhr & Loeser prepared that.

Q. On what commodity were these figures based?

A. On water.

Q. Do you know approximately when these figures were prepared for you?

A. I believe it was late in 1926 or early in 1927.

Mr. Erskine: I offer these four sheets for identification.

(Marked Petitioner's Exhibit 1 for Identification.)

Q. During the period of time in which you have described as the charter of the "T. N. No. 73" to the New York Tank Barge Company have you personally kept yourself informed of the operations of that barge and of what she has been carrying, and so forth?

A. I have.

Q. Based on your own knowledge of the operations of the "T. N. No. 73" during that period, have you found the calibration tables which you have just identified as being accurate?

A. Well, so far as gallon capacity, but actual gauging on a barge is a hard thing to do. I would not say.

Q. Have you found them accurate as showing the proportionate capacity of the four tanks?

A. Yes, sir.

Q. Will you explain what you mean in your last answer as not showing the exact gauge.

A. If you have a barge loaded and have a list, you cannot gauge accurately because of the list.

Q. How about the difference in the commodities you carry, is there a difference in density?

A. Yes, sir.

[fol. 36] Q. Is molasses heavier than water?

A. Molasses runs about twelve pounds to the gallon and fresh water about 8.33.

Q. Taking molasses, is there a variation in the density of various lots of molasses?

A. Yes, sir, it is all different. There is a difference between Java and other molasses.

Q. Can you tell by any gauge how many gallons of any commodity has been pumped on board?

A. No.

Q. In operating the "T. N. 73" did your company ever have any direct means of knowing how many gallons of any commodity was being carried?

A. Not to be accurate.

Q. When it came to the final figures on which the freight was based, who furnished the figures?

A. The customer we did the work for.

Q. I neglected to ask you before your connection with the New York Tank Barge Company, had you had other experience in the operation of tank barges?

A. Yes, sir.

Q. How long?

A. I started along in 1917.

Q. I understand that this "T. N. 73" is what is described as a single skin tank barge.

A. That is right.

Q. She was equipped with peak tanks fore and aft.

A. Yes, sir.

Q. Air spaces.

A. That is right.

Q. Her cargo space was divided by a center fore and aft bulkhead and by a midships thwartships bulkhead?

A. That is right.

Q. So those two bulkheads running fore and aft and across-ships actually divided the barge into four compartments for cargo?

A. Yes, sir.

Q. Was there a house on the after part of the barge for the crew?

A. Yes, a cabin there.

Q. Now in pumping or taking aboard any cargo, molasses or other commodity, and in discharging it, where did the barge obtain the power for the pumping and discharging?

A. Well, we got our steam from the ship or a tug.

[fol. 37] Q. The barge itself didn't have the means of pumping?

A. No, sir.

Q. That was furnished by the ship or from the shore?

A. That is right.

Q. Are you familiar with the type of tank barges customarily used in New York harbor for the carriage of commodities such as molasses?

A. I am.

Q. How would you say the "T. N. 73" compared with other barges used in type?

A. It was approximately the same type of barge.

Q. Anything unusual about her in respect to type or equipment?

A. No, sir.

Q. It was the regular run of that type of boat?

A. Yes.

Q. In the absence of any gauge or other knowledge of quantity on board at any given moment, will you tell me what the practice was of your company in determining the load of the "T. N. 73", more particularly in respect to a load of molasses?

A. We have a standard rule on all molasses barges that they should be loaded two inches below the guard line. The guard is about 12 inches, so that gives the boat about 14 inches freeboard, and that is the limit of the load.

Q. As I understand that answer it is in effect that you judge the load by the freeboard?

A. That is correct.

Q. You say the guard rail on the "T. N. 73" was 12 inches.

A. 12 inches, yes, sir.

Q. That guard rail on the top is level with the edge of the deck?

A. It runs from the guard up and that is about a four-inch camber. It is two feet from the guard rail. It runs on a slant up where the deck is higher than the guard.

Q. As you go back there is a camber which goes up too.

A. About four inches.

Q. At the extreme edge of the deck is it level with the guard?

A. Yes, sir.

Q. And the guard extends 12 inches below the extreme edge of the deck?

A. Yes, sir.

[fol. 38] Q. And your orders were to allow within two inches below the line of the guard?

A. Yes, sir.

Q. From your experience will you say whether or not in your opinion the "T. N. 73" so loaded with that freeboard would be properly and safely loaded with a cargo of molasses?

A. Yes, because of the experience we have had with it.

Q. You would consider with her draft and that freeboard that it would be seaworthy for that boat?

A. That is correct.

Q. During this period of ten or more years that the boat had been under charter to your company had you carried cargoes of molasses frequently?

A. Yes, sir.

Q. Had she carried them safely?

A. Yes, sir.

Q. What type of cargo did she carry before this?

A. Beet molasses.

Q. Do you remember how long it was between her carrying this cargo until she started to load this cargo on the 23rd?

A. I think there was about four or five days in between.

Q. Had there been any damage sustained or repairs made to your knowledge with respect to that last previous load of molasses?

A. We had none.

Q. From the time of the discharge of that last previous load until the time she commenced to load on October 23, had there been reported to you or did you have any knowledge of any accident or damage to the "T. N. 73"?

A. I did not.

Q. Now what was done by your company, the New York Tank Barge Company, with respect to supervising or keeping in touch with the condition of the barges which you chartered or operated?

A. We have two men that act as marine superintendents.

Q. You have a man named Neill?

A. Yes, sir.

Q. He is one of your port superintendents?

A. Yes, sir.

Q. Do you remember approximately how long you have [fol. 39] had him in your employ?

A. Ten or eleven years I guess, eleven, anyway.

Q. During that time have you yourself kept in touch with the duties he has performed and his performance of them?

A. I do it all the time.

Q. How did he perform them?

A. Satisfactorily.

Q. To your opinion was he a competent and efficient man?

A. Absolutely.

Q. To what extent do you entrust to O'Neill the supervision of the condition of these barges, how is it done?

A. He is supposed to be on and look over all the barges every month or so. He attends on the loading and discharging of these boats all the time, and he reports, or the captain himself reports any damages immediately.

Q. If anything is wrong with the boat you expect it to come under the attention of the captain of the barge and the port captain.

A. Both.

Q. Did you keep your men on board the barges all the time, your captains and mates, did you keep a crew on the boats all the time?

A. Unless we are at our own dock where we have a watchman, we do.

Q. Was this "T. N. 73" inspected by any other persons at any regular intervals?

A. By the Insurance Company of North America.

Q. How often?

A. They inspect it every year prior to the renewal of the insurance.

Q. In connection with that inspection or any reports from the port captain or the men on the barges that there was anything wrong, what would your company do?

A. We would immediately take it to the drydock and have it repaired.

Q. You say in this entire period from your own knowledge this boat was kept in good repair, the "T. N. 73"?

A. Yes, sir.

Q. Do you remember when the "T. N. 73" had been inspected last by the Insurance Company of North America?

A. May 22, 1937.

[fol. 40] Q. Do you remember when you had last made any repairs to the boat?

A. At that time. Repairs suggested by the Insurance Company.

Q. What is this paper I show you?

A. The invoice of the work that was to be done prior to getting the new insurance.

Q. At that time did you make all the repairs necessary?

A. We did all requested by the Insurance Company.

Q. Did you limit the repair man in any way in making repairs that were necessary?

A. No, sir. The surveyor gives us a list and we turn it over.

Q. When you turn it over to make the repairs did you limit them in any way in making them?

A. No, sir, we have one of our other men that takes charge and makes sure that the work is all done.

Mr. Erskine: I offer this bill in evidence.

The Court: Who were the repair men?

The Witness: Sparling. . .

(Bill marked Petitioner's Exhibit 2.)

Q. Up to the time that the "T. N. 73" commenced her loading of the cargo in question here on October 23, did you have any knowledge of any condition of damage or unseaworthiness in that barge or her equipment?

A. I did not.

Q. Have you ever learned of any since then?

A. I have not.

Q. I understand that at the time of this accident there were on board the barge a captain named John Tighe and a mate or assistant named Lester Head. Do you know those two men?

A. I do.

Q. And I understand that there had been previously another captain on the "T. N. 73" named J. Darnelle. Do you know him?

A. Yes, sir.

Q. How long has Darnelle been in your employ?

A. About nine or ten years.

[fol. 41] Q. And John Tighe?

A. I would say around about six or seven years.

Q. And Lester Head?

A. He has worked on and off for about five years for me.

Q. Did you know of your own knowledge the qualifications of those three men?

A. Yes sir.

Q. Were they in your opinion competent qualified men for the operation or handling of the barge "T. N. 73"?

A. I believe so.

Q. Had you ever found anything in their previous operation of the boat to indicate to you that they were not competent?

A. No.

Q. I believe it is a fact that at the time of this accident in October, 1937, there were no requirements for certificates for captains of such a barge at the "T. N. 73".

A. No, there was not.

Q. Did you from time to time go on the different barges yourself, including the "T. N. 73"?

A. I don't have the time to.

Q. Do you remember approximately what the amount was of the charges for raising this barge after she was sunk?

A. Yes, I think it was fifty-five or fifty-eight hundred dollars.

Q. What became of the barge after she was raised?

A. We sold her afterwards to James Hughes, 17 Battery Place, for junk.

Q. What price did she bring on that sale?

A. \$800.

Q. Do you know of your own knowledge as to the equipment, the lines which the barge "T. N. 73" had?

A. Not from actual knowledge being on the barge. I know what ought to have been put on there.

Q. Are you familiar with the bills paid by your company for supplies?

A. Yes sir.

Q. I show you a bill of Plymouth Cordage Company dated December 13, 1937. Do you recognize it?

A. I do.

Q. Is your recollection that the rope referred to therein was purchased at that time?

A. It was.

[fol. 42] Q. And was it reported to you in the regular course of business where that rope went?

A. Yes.

Q. Where did it go?

A. On the barge "T. N. 73."

Mr. Erskine: I offer the bill in evidence.

(Bill marked Petitioner's Exhibit 3.)

Q. Did you yourself examine the barge after it was raised on drydock?

A. I did not.

## Cross-examination.

By Mr. Matteson:

Q. Mr. Baldwin, how long have you been connected with the New York Tank Barge Company?

A. I founded it actually in 1923 and I incorporated it in July, 1924.

Q. Are you an officer of the Manhattan Barge Company?

A. I am not.

Q. Are you a stockholder of that company?

A. I am not.

Q. As I understand it, Mr. Neill is your port superintendent.

A. He is one of them.

Q. And he is the official of your company who has charge of keeping track of the upkeep of the barges and advises you when repairs are required?

A. That is correct.

Q. I understand your testimony to be that there were—that all the repairs he recommended at any time were carried out, is that correct or is it not?

A. Yes, they would be carried out if they were necessary to do.

Q. Were there any recommendations of his that were pending at the time of this accident?

A. Not that I know of.

Q. Does he make a monthly condition report with respect to the various barges of your fleet?

A. Not a written report.

Q. In what form does he make his report?

A. He is in the office once a week.

[fol. 43] Q. Are his reports verbal?

A. Verbal, yes, sir.

Q. Suppose he found something that is required and wants to advise you that certain work should be done on a certain barge.

A. We would call him on the phone right away and tell him.

Q. And there is nothing in writing about that?

A. Not necessarily, no.

Q. You are quite positive that there had been no recommendations of his prior to this accident that were not fully carried out?

A. I am positive.

Q. Of course, in making that statement you cannot rely on any written record, you are depending solely on your recollection?

A. That is correct.

Q. You regard Mr. Neill as a competent and careful man?

A. He has been with me quite a while.

Q. These three men on the barge——

The Court: They weren't all on at one time, were they?

Q. Were they all on at the time of the accident?

A. Only two.

Q. Which two?

A. Johnny Tighe and Lester Head.

Q. That is H-e-a-d?

A. I think that is the way he spells it.

Q. They have been with you a number of years and you have never known of any difficulty through their inexperience or incompetency?

A. Not that I know of.

Q. You regard them as thoroughly reliable and competent men?

A. Yes sir.

Q. Are they still in your employ?

A. They are.

Q. There was nothing connected with this accident, then, that caused you to question their continuance in your employ?

A. Not so far as I can see.

Q. In other words, you were satisfied with their conduct of the loading of the barge on this occasion?

[fol. 44] A. I was not there myself personally; I did not see the barge loaded.

Q. You had no reason to question it?

A. I did not have at the time, no.

Q. You bought these tank barges, the "73" and "74", in 1924 or 1925?

A. The Manhattan Tank Barge did.

Q. And you knew about the barges at that time?

A. I knew of the barges, yes.

Q. And have the barges been in your charter ever since?

A. Yes sir.

Q. And there have been no structural changes made in the barge?

A. On both or one?

Q. I refer particularly to the "73"?

A. No changes whatsoever on the "73".

Q. And these calibration figures were made up shortly after she came into your service?

A. I would say about a year or a year and a half afterwards.

Q. And there being no change in the barge there were presumably no change in the figures, they were presumably accurate up to the time she sank?

A. Yes.

Q. Have you no record of the actual dimensions of this barge in any particular at all?

A. No, we tried to get the blueprints from the Newburgh Shipyards, but that is out of existence.

Mr. Erskine: I propose to put in measurements actually made by surveyor on drydock. I am willing to give them to you now.

The Court: Read them in the record.

Mr. Erskine: Measuring on the outside length on deck 165 feet; length of beam, 136 feet; beam, 38 feet; depth from top of deck to underside of beam, 8 feet. The rake at the end began at a point 23 inches below the deck. I have no other measurements of the barge, and there are none available so far as I can find out.

[fol. 45] Q. In what year was the "T. N. 73" constructed?

A. I believe it was 1917 or '18; I am not positive; around that date.

Q. She was built for an oil barge, was she not?

A. That is correct.

Q. And then she was in service in Mexico for a number of years?

A. Yes, sir.

Q. From the time of her building until she was acquired by the Manhattan she was in service carrying oil in Mexico?

A. I believe so.

Q. What material was the barge made of?

A. She was a steel barge, all steel.

Q. What was the thickness of her plates supposed to be?

A. I believe it is three-eighths; I wouldn't be definite on that, but I believe it was a three-eighths plate.

Q. Were the "73" and "74" identical?

A. Originally?

Q. Yes.

A. I wouldn't say whether they were what you call sister barges. I think they were fairly close together.

Q. I notice from the books they appear to have the same registered dimensions.

A. I think they were built at the same time.

Q. They were substantially identical, then?

A. I should say so.

Q. Now in respect to the cargo tank, I think that from your description the cargo comes against the skin of the ship all around.

A. Just the same as any other oil barge.

Q. The cargo tanks are simply subdivisions of the hull?

A. That is correct.

Q. And the only thing that separates the cargo from the water outside is the hull of the ship?

A. That is the usual method of building them.

Q. During the time you were familiar with this barge from 1925 on, can you tell us how frequently she was painted?

A. I would say on an average every year or two years. Sometimes it would go two years. If the ice was bad in the winter we would have to paint her in the fall of the year. [fol. 46] Q. In the twelve years from 1925 to 1937, would you say it was fair to assume she had been painted ten times?

A. I would say from five to seven times, anyway.

Q. And when the barge was painted was she properly clipped?

A. She was, that is the usual method of painting.

Q. Have any of the plates ever been replaced?

A. There have been some plates renewed where it was necessary.

Q. But most of the plates were the original construction?

A. I would say so, yes.

Q. Can you give us the dimensions of these divisions of the hull that you call cargo tanks?

A. I could give them approximately.

Q. Isn't there a record anywhere of accurate dimensions for those tanks?

A. You mean the height and length?

Q. I would like the length and breadth and depth.

A. I think it is on the chart there.

Q. The calibration simply gives the computation of the gallonage per inch.

A. That will give you the height. From memory I will give you what I know.

Q. Give us the best you can.

Mr. Erskine: Mr. Gebauhr, the surveyor who made this calibration, is out of town, and his office has searched his file and cannot find his record of measurements. I understand he will be back tomorrow and I am going to try to find those measurements, but I have not them at the moment.

Q. Will you give us approximately?

A. Nos. 1 and 2, No. 1, port and starboard run about 72 feet, and the height is about 8 feet inside, and the width would be on each side 18 feet apiece, approximately. In other words, each tank is 72 by 18 by 8. The after tanks would run 58 feet long, 8 feet high and 18 feet beam.

Q. That is 52?

A. No, 58.

Q. By 18 by 8?

A. That is each side, port and starboard.

[fol. 47] Q. The barge was 38 feet wide?

A. 38.

Q. Twice 18 is only 36, how do you account for the difference of two feet?

A. That being on the bottom I don't know. I am just giving it from memory. I don't know whether that is the measurement or whether it would be 19 feet.

Q. You are not sure about the 18 feet?

A. I am not. I told you this is from memory.

Q. The forward tanks are larger than the after tanks?

A. Yes, sir, they are.

Q. And their capacity is greater?

A. Greater.

Q. Now this barge has pipelines on her deck for filling the tanks, hasn't she?

A. Yes.

The Court: You say there were some pipelines on deck?

The Witness: Yes, sir.

Q. These Enes connect with the various cargo tanks so they could be filled through the pipelines?

A. That is correct.

Q. These pipelines come together at some single connection?

A. They come right up to the pump and connect to the pump. There is a manifold at the top.

Q. Where is the pump located?

A. Almost amidships.

Q. That is on the deck of the barge?

A. On the deck.

Q. That is a steam pump?

A. That is correct.

Q. Do you discharge through the same pipes as you fill with?

A. We do.

Q. So the connection into the tank, I assume, continues down close to the bottom of the tank?

A. They go down to the sump in each tank.

Q. That is a depression at the bottom of the barge?

A. That is right.

Q. So that the fluid cargo will run into it so it can be pumped out?

A. That is right.

[fol. 48] Q. Now when you want to use this pump for discharge you have to have steam from an outside source?

A. That is right.

Q. And you sometimes discharge these barges into steam ships?

A. Very, very seldom into steam ships.

Q. You can do that?

A. You can do it, yes.

Q. And when you do that you have to have steam supplied by the steamship?

A. Yes, or they put a tug alongside.

Q. And it is not very difficult to arrange for steam supply if you need it?

A. No.

The Court: You have to get it from a steamer or a tug or on the dock?

The Witness: That is correct.

Q. Now when the barge "73" was being loaded on this occasion there was no steamship connection on her pump, was there?

A. I don't think so, no, because they wouldn't be using the pump at all.

Q. So there was no way in which cargo could be pumped out of the barge?

A. Not that I know of.

The Court: How did you get it filled, by gravity?

The Witness: No, the steamer pumps right into it; they pump to the rail and our hose connects at the rail with their hose. It pumps right in; they force it over their rail and down into our pipe.

The Court: The steamer pumps it into you. Go ahead.

Q. Now is there any means of equalizing the cargo between the tanks in the barge after it is in the barge?

A. There was.

Q. How is that done?

A. By valves.

Q. Are there valves between the compartments?

A. They are on deck, operated from the deck.

[fol. 49] Q. These valves are openings in the bulkheads between the compartments?

A. No; the pipeline, it is right in the pipeline.

Q. Was there any means of equalizing the cargo after it is in the hold?

A. Yes, by the valves. Whichever valves you turn; you have valves for the forward and aft tanks.

By the Court:

Q. Do these tanks connect?

A. Only by the pipeline. We can take a load forward and by-pass that by opening the valve into the other tank.

Q. It will find its level with the same liquid substance in the other tank?

A. Yes, sir, that is right. That is a by-pass.

Q. You don't need a pump for that?

A. No.

By Mr. Matteson:

Q. In order to equalize in that manner the pipeline would have to go up on the deck?

A. No, it goes right through. We have lines on top of the deck where you can load either side into the main line and they drop down to the main section which goes to the pump.

Q. You have a pipeline that runs along the deck?

A. Only part ways, and then it drops right into the tank.

Q. That you used to fill with?

A. That is right.

Q. Is that the pipeline you use to equalize with?

A. It is the same one because it continues all the way along underneath.

Q. With openings in each compartment?

A. We practically have two lines that run from the pump. It goes into a ten-inch and that connects the after tanks with the forward tanks and we have valves.

By the Court:

Q. Are the valves in the ten-inch pipe?

A. Yes, sir.

[fol. 50] Q. They are operated from the deck?

A. That is right.

By Mr. Matteson:

Q. Are there two, one on each side?

A. There are four valves all told.

Q. The ten-inch pipeline is in the bottom.

A. There is only one ten-inch.

Q. Does that connect with all four?

A. With all four there is an elbow and it spreads into all the tanks.

The Court: A ten-inch pipe.

The Witness: Yes.

Q. Can you equalize from port to starboard?

A. Both ways.

Q. Now this molasses cargo is a heavy viscous cargo, isn't it, it will sink in water if poured into water?

A. No, it will dissolve.

Q. Unless there is some agitation it will not dissolve, will it?

A. No, it will dissolve right away.

Q. It fuses right away?

A. Yes.

Q. How does it happen there was so much molasses left in these tanks?

A. The water had been washed out at the top.

Q. But there was considerable undissolved molasses in the tanks after the barge was raised.

A. I don't know the amount.

Q. There was quite a bit pumped out.

A. In water solution.

Q. Now this heavy viscous fluid which is molasses is a cargo that is apt to shift, isn't it?

A. I mean if you got a little list or a little drag the cargo moves along as a solid viscous mass, doesn't it?

A. I don't just understand how you mean.

Q. The practical men say it creeps.

A. It moves very, very slow.

[fol. 51] Q. But when there is something to start it moving it creeps and it is difficult to stop, isn't that so?

A. I don't see why. I don't know about that.

Q. You say that you have never had any accidents with these barges?

A. I didn't say that, no.

Q. Were you operating the "T. N. 73" in September, 1926?

A. Yes.

Q. Don't you recall that she listed and capsized with a cargo of 175,000 gallons of molasses on that occasion?

A. That is correct.

Q. And were you operating the "74" in April, 1927?

A. Correct.

Q. And you recall that in the Hudson River she went down by the head and plunged to the bottom the same as this barge did?

A. I don't know about the same way, but she sunk at Newburgh.

Q. She went down by the head?

A. I couldn't say how she went down.

Q. Both of these accidents were due to the shifting of the cargo, weren't they?

A. That I couldn't say.

Q. In any event, your statement that you hadn't had any accidents is not correct.

A. I didn't say that. I don't think that question was asked before.

Q. I got that impression. Perhaps I have misunderstood you. We are clear now that you have had previous accidents.

Mr. Erskine: I object to that.

The Court: Well, there were two accidents in 1926 and

1927 which were testified to and to which you made no objection.

Mr. Erskine: No, but I do object to him saying that he now admits there were accidents.

The Court: The record will show what he said.

Q. Now barges constructed with steel plates, after a certain length of time, these plates do wear thin, don't [fol. 52] they?

A. That I could not say definitely. There would be some wear, but it would depend on where it is and how much it is.

Q. And they corrode a bit sometimes?

A. Yes.

Q. And naturally there isn't only the corrosion, but the effect of the chipping whenever you paint the barge, it tends to thin down the plates?

A. The chipping takes the rust off.

Q. Well, the rust comes from the plates so some part of the steel has been removed when you chip off the rust.

A. I am not an engineer on that end of things.

Q. Rust is corrosion of the plates itself, isn't it?

A. I suppose, if you say so; I don't know.

Q. Now you say you had these repairs specified in Exhibit 2 made in June, 1937?

A. In May, 1937, the 22nd of May. The bill is rendered in June.

Q. May, 1937, is the date of the repairs.

A. That is right.

Q. I notice one item here welded leak in the after peak, so much. Do you know just what those leaks consisted of?

A. I do not myself. Whatever was done had to be done.

Q. Evidently there was a leak in the after peak that was corrected by welding.

A. Yes, sir, we welded it right away.

Q. In welding they spread a little new metal over the surface by a heat treatment and make it part of the original?

A. They make it stronger than the original.

Q. It is replacing a thickness of the plate that has disappeared?

A. It covers the hole and fuses.

Q. Welded a two-inch nipple in the pump manifold. Is that replacement of corrosion?

A. No, probably a broken nipple.

Q. Here is an item welded hole and thin pits in tank bottom, so much.

A. Apparently there was a very small hole, because it was a very small bill.

Q. Welding isn't very expensive.

A. Oh, yes, it is.

[fol. 53] Q. Welded a hole in thin pits in the tank bottom. Whatever was welded it was small, apparently, because the charge is small.

The Court: How much was the charge?

Mr. Matteson: \$10.

Q. It does indicate that some plates had corroded so there were thin pits in it and even a hole.

A. From that sized bill it must have been a very small hole.

Q. The repair was small.

A. That probably only took an hour or an hour and a half time. That was recommended by the Insurance Company of North America.

Q. Some plate had corroded to the extent there was a hole and thin pits that required welding, is that correct?

A. That is correct.

Q. Here is another item "Baled out water, cleaned ship and burned limber holes in the after peak." What does that mean?

A. The seams go across the after-end of the peak and in the original building instead of putting a limber hole so any sweat would run through, it was laying on the limber so we had that put in so the water wouldn't lay there and rust. That is on the side, the beams that run across the after-end of the side in the peak, the fore and aft peak was done the same way.

Q. These limber holes, what were they in?

A. In the beam.

Q. And ditto in the fore peak?

A. Yes, the same in the fore and the after peak to get rid of that water.

Q. Here is another item for pumping the after peak. Evidently the after peak had been leaking.

A. No.

Q. Why should you pump out the after peak then?

A. We had to put in water to lower the after peak down in order to make the ways.

Q. There were leaks in the after peak that were welded?

A. Apparently some small leak there.

[fol. 54] The Court: You mean to get up in the drydock?

The Witness: Yes.

Q. There were no rivets renewed at the time of this repair?

A. Not according to that bill, no.

Q. And this was the last time that the vessel was on drydock before the accident?

A. That is right.

Q. So it was the last time any repairs were made to her hull?

A. Yes, sir.

Q. What is the load of Java molasses that the "73" would safely take?

A. About 169 to 179 thousand gallons.

Q. Do you know what amount the barge captain was instructed to take on this occasion? Was it 175,000?

A. No; his usual load.

Q. The usual load would be a hundred and seventy-five?

A. It would depend on the weight of the molasses.

Q. In respect to determining the amount of liquid cargo in any one of these cargoes with this calibration scale that you have furnished us, assuming that the barge was on an even keel, all you would have to do would be to take a sounding with a stick and read the depth of the liquid and apply it to the calibration scale?

A. That would give you approximately, if you were absolutely dead level.

Q. Supposing for instance she is trimmed by the stern, you have arrangements so that soundings can be taken at both ends of the tank, have you not?

A. Yes.

Q. So if she was by the stern you could take a sounding fore and aft and take an average, and you would have approximately the gallonage in the tank?

A. Very approximate.

Q. It would be within a very narrow limit?

A. We tried that, and we gave it up entirely.

Q. Of course, if you are going to be accurate for a few gallons, but it would give a pretty approximate idea of what was there?

A. No; way off.

Q. Why; can you give us any reasonable explanation [fol. 55] of that?

A. Yes, sir; because you might have a list to port or starboard.

Q. I have just assumed—

A. If everything was exact, that would be true, but that has never been that I have seen.

Q. If she was on an even keel forward and aft and had a list to one side you could take a sounding in the middle and at the side?

A. You cannot take the middle; there is no hatch there to take it.

Q. These barges are fitted with pipes through which soundings can be made.

A. We have hatch covers.

Q. And you have openings in the hatch covers?

A. They have vents through the gooseneck vents. It is an opening where a vent is put in, but we have to take the hatch right off to take a sounding.

Redirect examination.

By Mr. Erskine:

Q. Mr. Matteson brought out from you that this boat had a single skin and that being so the molasses in the cargo space would be against the skin of the barge. That is right, isn't it?

A. That is correct.

Q. It is equally true if there were any leakage in the area of the skin of the ship in the cargo space the water would come directly into the cargo space?

A. That is correct; yes, sir.

Q. Was there at this time any practice of an inspection of your molasses barges by representatives of cargo interests before loading?

A. Yes, sir; the surveyor on the molasses ships is supposed to inspect our barges before we start loading.

Mr. Matteson: Won't you agree that the only inspection that is made is by the sampler for the purpose of determining whether the hold is clean?

Mr. Erskine: No, sir; I won't agree to that. I will stipulate that this barge was examined by Mr. Garpinello on behalf of cargo interests within six hours before the

loading commenced and that he passed the barge as being clean and fit to receive the cargo, and that he will testify that if there had been any evidence of any leakage into the cargo space or into the barge he would not have passed it. Will you stipulate that?

Mr. Matteson: With the additional qualification that he is not a hull surveyor and not qualified as such and that at the time he made his inspection the barge was light.

Mr. Erskine: I will agree to that.

Mr. Matteson: And add this, that he is simply a weigher and gauger, and the purpose of the examination was to determine the cleanliness of the hold and what the prior cargo had been. Of course if it had been fish oil, he wouldn't have passed it.

Mr. Erskine: As long as you stipulate that he saw no leakage into the cargo space and would not have passed it if he had seen it, I am satisfied.

Mr. Matteson: That is all right with the qualification that the barge was light at the time.

Q. You gave to Mr. Matteson some figures on the dimensions of this barge, these cargo compartments. Your statements are to the best of your recollection but not based on definite measurements?

A. That is what I said in the first place.

Q. Mr. Matteson asked you a number of questions about equalizing the cargo in the different compartments. Is there or was there any opening in the fore and after and thwartship compartments between the bulkhead?

A. No, sir; it is controlled by a pipe line, controlled by valves.

Q. There was no opening in the bulkhead itself to let cargo run through?

A. No, sir.

Q. In connection with any repairs made to the vessel was it the practice for you to be advised of the repairs, [fol. 57] the necessity, and what was required?

A. All major repairs. Minor repairs they did themselves.

Q. If there was anything that required repair work and drydock you would be advised of it?

A. We would be advised immediately.

Q. When you say from your experience that if the vessel had been docked and inspected in May, 1937, that the ordinary proper operation of tank barges of this type would re-

quire her to be docked again before October 23rd in the absence of any accident or damage?

A. I would say not.

Q. Could you tell me from your own direct knowledge whether your practice of judging your loads by freeboard is different from the practice of other operators of tank barges of this type?

A. I could not say exactly what they do. I know with oil barges they load them much heavier than we do.

Q. Has that been the practice with any companies you have been connected with since you have been engaged in operating tank barges?

Mr. Matteson: I object to that.

The Court: You don't intend to show any practice to the contrary, do you?

Mr. Matteson: No.

Q. Has it been the practice?

A. I believe so.

Q. The companies you have been with since you have been connected with tank barges?

A. That is right.

The Court: In other words, they gauge how low the vessel is in the water and how much freeboard there is and they say when they reach a certain point they are loaded?

The Witness: That is it.

The Court: There is no meter on the barge to show what you have taken aboard or how much there is in each tank? [fol. 58] The Witness: No, we don't get that until we get to the pump house and we get the number of pounds and gallons there.

Q. So far as you are aware, are there tank barges equipped with flux pipes?

A. I couldn't say for sure. The most of them are not. The newer ones might be.

The Court: What are flux pipes?

The Witness: They go down into the tank so you can drop a line down.

Q. You referred to an accident to the "T. N. 73" and one to the "74". What have you to say about those occurrences in connection with your previous testimony?

A. In what respect?

Q. Mr. Matteson, as I recall it, said the "73" had listed with a cargo of 175,000 gallons of molasses on board. I take it if that is the fact she had a full load.

A. She had a full load and was tied to the dock on Staten Island.

Q. Now about the other accident; the "74" went down by the head while being towed?

A. Yes, sir.

Q. Do you know how she was being towed?

A. No, sir.

Q. Is it not a fact that a great deal might depend on what the tug was doing to her?

A. No question of that.

Q. Would you say it is a fact that if the bow compartment were partly full of molasses and through some neglect or oversight the men overloaded the stern compartment so as to put her down by the stern the cargo in the forward end would then run back aft?

A. It would run back to the bulkhead.

Q. Against the thwartship bulkhead?

A. Yes, sir.

Q. And that would tend to throw a good deal of the weight nearer to the stern than it had been?

A. Yes, it would.

[fol. 59] Recross examination.

By Mr. Matteson:

Q. I understand that trim is your criterion for the loading of the barge?

A. No.

Q. You say you loaded to a 14 inch freeboard?

A. That is correct.

Q. And you cannot depend very much on the soundings you take?

A. So what?

Q. So in determining the distribution of the cargo, the captain would necessarily be governed greatly by the trim of his vessel?

A. That is right.

Q. Is it not a fact that the "74" when she sank in the Hudson River, that the accident was caused by a leak in the

forepeak which caused her bow to go down and her cargo to go forward?

A. That is the first time I heard of it, if it is.

The Court: Don't you think that is pretty far removed from the date of this accident?

Mr. Matteson: It is removed in date, but the circumstances are quite a bit similar.

The Court: Suppose I was to decide every case involving a tug in here based upon other circumstances where a tug had had trouble ten years back; we would never get through trying the cases.

Mr. Matteson: I didn't introduce the subject.

The Court: There is some question whether you did or not. The witness claims you did.

Mr. Matteson: I have asked the question because I understood Mr. Erskine had asked the witness and the witness replied they had been carrying cargo for ten years and had no accident.

The Court: He would be right because these were over ten and a half years back. I don't think it has any bearing on the case unless you can show there were defects ascertained then that they did not correct after the accident.

[fol. 60] Mr. Matteson: I do not disagree with anything your Honor says.

Mr. Erskine: I am proposing to prove by the direct evidence of how this barge was loaded that taking Mr. Matteson's allegations of the 165,000 gallons placed on board at the time, that is, based on his information, that that quantity of cargo could not have been on board in the way it was put aboard without loading the stern under water. That is a physical fact.

Mr. Matteson: Is Mr. Erskine willing to take Garpinello's figures as to the amount pumped on board? His figures are 165,000 gallons.

Mr. Erskine: Is that what you plead?

Mr. Matteson: Yes, sir.

Mr. Erskine: I have no means of disputing it directly. I have no knowledge, but I prefer to stand on the basis that you pleaded it, and if I do not dispute it, it stands. I do not want to admit something that I do not know.

The Court: Have you denied it in your pleadings in any way?

Mr. Erskine: I don't know how this man arrived at this

figure. There is no gauge through which the molasses flowed.

The Court: As I understand then there is no stipulation on the amount of molasses pumped into the barge.

Mr. Matteson: I take it it is not questioned that it was at least 165,000. My pleading may be an admission, but it doesn't bring the fact before the Court.

The Court: Do you wish to make that concession?

Mr. Erskine: I don't see why Mr. Matteson is so anxious for me to do it.

[fol. 61] The Court: Perhaps you better wait and see then.

Mr. Erskine: I have offered the testimony that we do not know how much was pumped on the boat.

JOHN DERNELLE, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination.

By Mr. Erskine: —

Q. In October, were you in the employ of the New York Tank Barge Company?

A. I was.

Q. And you still are?

A. Yes, sir.

Q. About how long altogether have you been in their employ?

A. I believe it was late in 1930 or in 1929; I am not sure.

Q. During that time have you served as captain on the "T. N. 73"?

A. Yes, sir.

Q. You were not aboard at the time of this sinking on October 23-4?

A. I was not.

Q. How long before that had you gone off the barge?

A. Six days.

Q. What was the reason for your going off the barge?

A. My yearly vacation.

Q. What kind of a cargo had you carried the last time on the barge before you left it?

A. Beet molasses.

Q. Do you remember how long it was from the time you discharged the last cargo until you left the boat on your vacation?

A. I wouldn't say exactly, but I would say about seven or eight days.

Q. Was there so far as you know any damage of any sort to that last cargo?

A. None at all.

Q. At the time of unloading the last cargo, what was the condition of your boat with respect to tightness?

A. Everything was tight and shipshape.

[fol. 62] Q. What was the condition of the boat at the time you left it for your vacation?

A. It was all correct; otherwise I would have reported it.

Q. In between the last cargo that you carried and the time you left the boat, was there any accident or damage to the barge?

A. No, sir.

Q. Was Lester Head a mate on the barge under you?

A. Yes, sir.

Q. He remained on the barge when you went on your vacation?

A. That is right.

Q. How long had you been acquainted with Lester Head in your work for this company?

A. I had worked with him on and off about three years on that boat.

Q. During that time what had been the character of his work?

A. To help me in handling the barge and cargo.

Q. Had there been anything about his work under you to indicate any incompetency or lack of experience?

A. No.

#### Cross-examination.

By Mr. Matteson:

Q. What is your age?

A. 29.

Q. How old a man is Head?

A. I think we are about the same age, maybe a little younger; I couldn't tell.

Q. From whom did you receive your pay?

A. From the office. Mr. Neill brings the payroll around and we receive it from him.

Q. Are you paid in cash?

A. Usually.

Q. You are not paid by check?

A. Oh, no, sir.

Q. And you live on the barge?

A. I did at that time.

Q. Do you buy your own food and grub?

A. On the barge, yes.

Q. You didn't get any allowance for that from the company?

A. No.

Q. Have you ever taken a molasses cargo from the motor vessel "Athelsultan"?

A. I think I have.

[fol. 63] Q. And the usual cargo you take on the "73" is about 175,000 gallons of molasses?

A. Not quite that much; it depends on the weight of the molasses.

Q. Of Java molasses would you dispute that 175,000 gallons was the average?

A. I would say about 168 or 5.

Q. That brings her down to what draft?

A. Well, I won't say what the draft would be. The draft of the barge loaded was two inches below the guard. I couldn't tell you how much is in the barge at that time if she is down that far.

Q. How long does it take to pump a full cargo from the "Athelsultan" into Barge "73"?

A. I have had it take ten hours and sometimes four hours and I have had it take two hours.

Q. From the same ship?

A. No, not from the same ship.

Q. I was talking about the "Athelsultan". Doesn't it take about four to four and a half hours to load the cargo?

A. I wouldn't be pinned down on any set time.

Q. I am talking about the "T. N. 73" and the "Athelsultan". Wouldn't you say the loading time is about four to four and a half hours?

A. I would say so, about, yes, sir.

Q. Do you know whether this cargo taken from the "Athelsultan" was the next cargo taken after the one you carried?

A. That I don't know; I wasn't there.

Q. You left how long before the accident?

A. Six days.

Q. And the last cargo you had carried was six days before that?

A. Yes, sir.

The Court: Prior to the time you went on vacation.

The Witness: Yes, sir.

Redirect examination.

By Mr. Erskine:

Q. Where was the barge laying when you left her after you discharged the last cargo?

A. Dock I, Weehawken.

[fol. 64] Q. When you loaded a cargo of molasses on the "T. N. 73" or when you did load it, was there any means by which you could tell how many gallons were on board?

A. No, sir; we weren't called upon to do it. We were called upon to take a full load.

Q. What was your practice as to determining what was the proper loading—the proper load of molasses? How did you decide that?

A. From the freeboard over the side.

Q. Had you any orders from the company as to how much freeboard to allow?

A. We had a standing order in the company never to go above the mark.

Q. Now with respect to the time of loading; you state that may vary?

A. Very much.

Q. That depends on the flow of the molasses?

A. And the condition of the pump on the ship, the type of the molasses, and many different things.

Q. And the temperature of the molasses?

A. Absolutely.

Recross examination.

By Mr. Matteson:

Q. Can you tell us who was in charge of Barge "78" at the time of the sinking of the "T. N. 73"?

A. Yes; we had a steady captain on her by the name of Joseph O'Neill.

(Witness excused.)

CHARLES E. NEILL, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. Mr. Neill, October, 1937, were you in the employ of the New York Tank Barge Company?

A. Yes, sir.

Q. And you still are?

A. Yes, sir.

[fol. 65] Q. How long have you been in their employ?

A. Twelve years.

Q. In October, 1937, and previous to that date what was your position with them?

A. I was assistant superintendent.

Q. What were your duties, particularly in respect to any boats they owned or charter operated?

A. I had to travel around the steamships and around the boats to look after the general condition of the boats.

Q. Speak louder.

A. To look out for the general condition of the boats and get reports from the captains and report to the office.

Q. Were you acquainted with the "T. N. 73"?

A. I was.

Q. How often would you say you would board that boat on an average?

A. Well, I would say once a week.

Q. Were you on the "T. N. 73" on the date on which she commenced to load this cargo when she sank?

A. Yes, sir.

Q. Were you there before she commenced to load the cargo?

A. Yes, sir.

Q. Did you look at the boat at that time?

A. I did.

Q. Was there any inspector there at the time you looked at the boat?

A. Yes, there was Mr. Garpinello, the cargo inspector.

Q. Did you look over the boat at the time he did?

A. I did.

Q. Did you look in the cargo compartments?

A. I did.

Q. What did you find the condition of the boat to be?

A. I found it was all right.

Q. What was the condition of the boat as to tightness?

A. Absolutely tight.

Q. Did you see anything to indicate she was leaking in any way?

A. Not a thing.

Q. Were you there when the barge began to take her load aboard?

A. Yes, sir.

Q. She was then laying alongside the Steamship "Athel-sultan", was she?

A. Yes, sir.

[fol. 66] Q. Which side of the barge was next to the ship?

A. The starboard side—just wait a minute, now. That was the port side.

Q. You think it was the port side?

The Court: Of the barge?

The Witness: Yes, sir.

Q. Against the starboard side of the ship. Were they both laying in the same direction, the bow end of the ship and the barge?

The Court: If you are not sure, say so.

A. I am not sure right now.

Q. Did you notice or do you remember what lines were out from the barge to the ship?

A. Yes, sir.

Q. What lines were there?

A. There were two lines forward and two aft.

Q. Do you know of your own knowledge when those lines had been put aboard, any of them?

A. Well, there were three brand new lines just broke out.

The Court: When were they put aboard the barge?

The Witness: About 10 days before.

Q. Did you notice what was done when the barge commenced loading, that is, in which of the compartments she started to take the load?

A. Into the forward tank.

Q. Anything unusual in that?

A. No, sir.

Q. Did you leave while she was still loading in the forward tank?

A. Yes, sir.

Q. You weren't there present at the time the trouble developed later on?

A. No, sir.

Q. Who was on the barge when you left her?

A. The captain and mate.

[fol. 67] Q. Captain Tighe?

A. Captain Tighe and Mate Lester Head.

Q. How long had you known those men in connection with your work with the New York Tank Barge Company?

A. In connection with the work, I hired Johnnie Tighe about seven years ago.

Q. During that time had you supervised their work on the barge or barges they were working on?

A. Yes, sir.

Q. What was your opinion or observation of the character of their work on the barges?

A. It was very good.

Q. Did you find anything to indicate to you that they were incompetent or inexperienced?

A. No, sir.

Q. Where were you when you first heard of anything wrong with the "T. N. 73"?

A. At the Commercial Molasses Company.

Q. What were you doing there?

A. We had the other barge up there.

Q. And how did you receive notice about anything wrong with the "T. N. 73"?

A. A telephone call.

Q. What did you do?

A. I went right down there.

Q. Do you remember what time you got there?

A. I guess about one-thirty; somewhere around there.

The Court: Right after midnight, in the morning?

The Witness: Yes, sir.

Q. What did you find with respect to the "T. N. 73" when you first arrived?

A. I found the stern of the barge was way under water, practically up to the center of the barge.

Q. Was there anything still holding her to the steamship?

A. Yes, sir.

Q. What?

A. There were two lines forward and there was a line aft. I don't know whether it was holding or not, but the pipe line was still hooked up and had the weight of the barge on it. [fol. 68] Q. Did those fastening or lines continue to hold her indefinitely or did something else happen?

A. She just stayed there indefinitely. I think it was the discharge line that was holding her up.

Q. What happened after you got there; was there any change in the position of the barge?

A. No, there was no change until six o'clock in the morning.

Q. What happened then?

A. The pipe line broke and she dived down.

Q. What happened to the barge?

A. It went to the bottom.

Q. She was completely submerged?

A. Completely submerged.

Q. Did you see the barge after she was raised and put on drydock?

A. Yes, sir.

Q. Tell us what the condition of the hull of the barge was when you saw it on drydock after she was raised?

A. Well, on the part of the barge where the slings had been around it on each side there were dents in her and the plates were broke, and Merritt & Chapman had put wood in them to hold the water from coming in and also around the deck. The deck was all fallen in.

Q. Aside from the damage around where the slings had contacted her, did you find any evidence of any leakage in the sides of the barge?

A. No, sir.

Q. Did you look over her to see if there was any explanation of what happened?

A. Yes, I did.

Q. Had you given any instructions to Tighe and Head and Dernelle and other employees of the New York Tank Barge Company regarding the method of determining loads of the barges such as the "T. N. 73"?

A. I especially spoke to Johnnie Tighe before I left the barge.

Q. What were your instructions?

A. Not to load above the rail; to keep it down below the rail.

Q. What do you mean by that, as to where the rail would be?

A. About two or three inches below the rail.

[fol. 69] Q. You mean the instructions were not to load so the rail would be in the water?

A. That is right.

Q. Do you know how deep that rail was on the side of the boat?

A. It was about a foot.

Q. Did your experience in the operation of this boat satisfy you that that was a proper freeboard?

A. Yes, sir.

Q. A safe freeboard?

A. Yes, sir.

Q. There is no means on the barge itself of determining the exact number of gallons pumped in, is there?

A. No, sir.

Q. No gauge?

A. No, sir.

Q. When you arrived and found the barge as you have described her with the stern end under water, was there anything you could do then to save any portion of the molasses which was on board of her?

A. The tanks were full of water then and we could not get to the valves or get to the line to get a steamline up.

Q. Was there anything you could do to save the cargo?

A. No, sir; I talked that over with Johnnie Tighe.

Q. During the period that you had been acting as port superintendent, what do you say as to how the "T. N. 73" was kept up with respect to her seaworthiness and tightness?

A. She was always kept in condition.

(Recess to 2:00 P. M.)

#### AFTERNOON SESSION

CHARLES E. NEILL, resumed the stand.

Cross-examination.

By Mr. Matteson:

Q. Mr. Neill, what is your age?

38—37.

Q. You have been with the New York Tank Barge for 12 years, I think you said?

A. Yes, sir.

[fol. 70] Q. Prior to going to the New York Barge what has been your employment?

A. Seaman.

Q. On seagoing vessels?

A. Yes, sir.

Q. Were you a licensed man?

A. No, sir.

Q. An able seaman?

A. Yes, sir.

Q. How long had you been going to sea?

A. Since 1917.

Q. And that was your only employment prior to going with the New York Tank Barge?

A. Yes, sir.

Q. With the New York Tank Barge in what capacity did you start with them?

A. As a deckhand.

Q. On one of their barges?

A. Yes, sir.

Q. Which barge?

A. The "Teddy Furke".

Q. How long did you serve as deckhand on a barge?

A. Until 1932.

Q. Then in what capacity did you serve?

A. Captain.

Q. How long did you serve as captain?

A. Up until 1935.

Q. And in 1935 what position did you assume?

A. The position I have got right now, assistant superintendent.

Q. Have you ever had any employment in a shipyard?

A. No, sir.

Q. You never constructed any ships?

A. No, sir.

Q. You never held a license of any kind?

A. No, sir.

Q. And the only information you have with respect to boats and their upkeep you have acquired as a deckhand or mate on these barges?

A. Yes, sir.

The Court: Practical experience?

The Witness: Yes, sir.

Mr. Matteson: Yes, practical experience.

Q. Do you ever estimate repairs and costs?

A. No, sir; I have nothing to do with it.

Q. You never make surveys of barges for determining the repairs necessary and the costs?

A. No, sir.

The Court: You have two questions there. Strike it out.

[fol. 71] Q. You know what we call the survey of a barge?

A. Yes, sir.

Q. Where repairs are specified and costs agreed upon?

A. Yes, sir.

Q. You never participated in those?

A. I have nothing to do with them.

Mr. Erskine: That does not answer the question, I think, your Honor.

Q. I mean participate in the cost or the survey?

The Court: Have you ever examined barges to determine what repairs they need?

The Witness: Yes, sir.

The Court: Do you ever figure the costs?

The Witness: No, sir.

Q. All you have is your experience of working on barges as to the repairs needed?

A. My experience on barges.

Q. When you go around from time to time, what examination do you make of the barges beside what repairs are necessary?

A. Well, I look the barges over and see what will be needed.

Q. You ask the barge captain?

A. Yes, sir; that is the first thing done.

Q. And you check up on what he tells you?

A. Yes, I check up on what he tells me.

Q. Is that all you do?

A. Well, I look the barge over myself and if he says something has to be done I look at it and report it to the office.

Q. Are you competent to look a barge over from stem to stern and examine all her plates and test them and determine what condition she is in?

A. No, sir.

Q. You went down to the place where the "Athelsultan" was discharging her molasses on the day this accident occurred, didn't you?

A. Yes, sir.

[fol. 72] Q. Were you there when the barge "No. 78" was loading?

A. Yes, sir.

Q. How much cargo did she take; how many gallons, or about; can you tell me?

A. I cannot tell you.

The Court: "No. 78" loaded this same ship?

Mr. Matteson: Yes, sir; immediately preceding the "73".

Q. She is a barge of similar type to the "73", is she not?

A. Yes, sir.

Q. Did you see her when she was finished loading, the "78"?

A. Yes, sir.

Q. Did she have a full load?

A. Yes, sir.

Q. Now she began loading, according to the record that I have, at 12:15 P.M.; is that correct?

A. That is about the time.

Q. Do you know what time she finished loading?

A. Around seven or eight o'clock, something like that.

Q. And you cannot tell us approximately how many gallons these barges took?

A. Well, she may have had about 160 to 175 thousand gallons.

Q. That is about a normal load?

A. About a normal load.

Q. Just when was it you examined the "No. 73" that day?

A. Just before she started loading.

Q. Just tell us exactly what you did to examine her?

A. Well, I examined both barges together around noon-time first. I examined the "78" because she was loading first, and then I went to the "73" with Garpinello and looked down over the tanks with him. The tanks looked dry with just a skin of molasses, and I looked into the two peaks.

Q. You didn't go into the tanks, did you?

A. No, sir.

Q. And Mr. Garpinello didn't either, did he?

A. No, sir.

Q. Where were these hatches you looked through to look [fol. 73] into the tanks?

A. There is an opening on each end of the tanks and you can look down the forward and the after end of the tanks.

Q. It is dark in the tank?

A. Not in the daytime it isn't.

Q. The only light comes through the hatchway?

A. Right you are.

Q. And the tanks are 54 to 72 feet long?

A. Yes, sir.

Q. Did you use a flashlight?

A. Yes, sir.

Q. The tanks had had molasses in them, hadn't they?

A. Yes, sir.

Q. And the sides and bottom were sticky with molasses?

A. Yes, sir.

Q. So if anyone had gone into them at that time they would have had to have a rubber coat and boots?

A. I expect so, if you wanted to save your suit.

Q. And neither of you were so equipped?

A. Garpinello was, I believe.

Q. What did you see when you looked into the tanks?

A. Just a skin of molasses and nothing else.

Q. And because that was all you saw you decided the boats were ready to load; is that it?

A. Yes, sir.

Q. You say you looked into the peaks too?

A. Yes, sir.

Q. How did you look into them?

A. Through the hatchway.

Q. Where were the hatches that lead into the peaks located?

A. About four feet from the side of the barge, four or five feet from the side.

Q. And how near the stern or bow?

A. I should say about six feet.

Q. How big are those hatches?

A. They are about two foot by two foot.

Q. Were the hatches covered when you went to examine them or were they open?

A. Which hatches do you mean on the tanks?

[fol. 74] Q. On the tanks or peaks.

A. The peak tanks were closed; the cargo hatches were open.

Q. You opened them in order to look into them?

A. Yes.

Q. There weren't any of them dogged down?

A. The peak hatches are always dogged down.

The Court: Did you have to open them to look in?

The Witness: Yes, sir.

The Court: And were they dogged down after that?

The Witness: Yes, sir; they were dogged down after that.

Q. These cargo hatches, the after cargo hatches, where are they located on the deck of the barge?

A. Right behind the cabin, about two foot astern of the cabin.

Q. Two feet astern of the cabin?

A. Yes.

Q. Where is the cabin located?

A. I would say about 20 feet from the stern of the barge. I don't know for sure that that is right.

Q. How far from the stern of the barge are the cargo hatches located?

A. The cargo hatches?

Q. The cargo hatches?

A. You mean the stern hatch?

Q. Yes; the stern cargo hatches.

A. I guess that would put it about 18 feet, I guess.

Q. That is your judgment, is it, that it is about 18 feet?

A. As far as I can figure it.

The Court: From the stern?

The Witness: From the stern.

Q. These hatches are not watertight unless they are dogged down, are they?

A. No, sir.

Q. They have gaskets that have to be dogged down on the frame of the hatch; is that it?

A. Yes, sir.

Q. And if they aren't dogged down, the gasket itself holds them up on one side, doesn't it?

A. Yes, sir.

[fol. 75] Q. Now I am still not quite clear about the pumping arrangements on the barge. You have your pump amidships, I understand.

A. That is right.

Q. And your intake is there where the pump is?

A. Yes.

Q. And there at the pump you have a manifold with pipes leading into the different hatches; is that right?

A. That is right.

Q. Is this manifold on the port or starboard side?

A. It is on the port.

Q. On the port side. Now take the port tanks first. Where are the pipe lines or the discharges into the tanks from the manifold?

A. Directly under the pump on each end of the pump.

Q. So it will be at the forward end of the after tank and at the after end of the forward tank?

A. Yes, sir.

Q. And these pipe lines that go into the tank go down close to the bottom of the tank?

A. Yes, sir.

Q. And there is a sump so when you want to pump the molasses out you can pump it out?

A. Yes, sir; on the after tank.

Q. Where are the pipes leading into the starboard hold?

A. The one line runs through the bulkhead and connected up with her valve.

Q. Where does it run through the bulkhead, below decks?

A. Below decks; yes, sir.

The Court: Are you talking about the lines that run down from the deck?

Mr. Matteson: That is what I am trying to clear up.

The Court: Tell us what piping is there leading from the deck down into the four different holds.

The Witness: Your Honor, on the aft tanks there is a lead coming right down from the leading line, and you have five feet of leading line and a lead that goes directly down [fol. 76] into the tank. On the forward end there is three or four feet of pipe and that is all the line you have on deck.

Q. Just those two lines?

A. Yes, sir.

Q. So the discharge lines into the port tank after it goes through the deck continues down close to the bottom of the hold?

A. On the after tank.

Q. On the forward tank?

A. It runs along the deck to the forward end of the barge.

Q. Then, as I understand it, the discharge into the after tank goes right straight down from the pump. The forward running line runs forward about four or five feet?

A. Yes, on deck.

Q. And then goes down into the tank?

A. Yes.

Q. And then runs forward to the forward end of the tank?

A. To the forward end of the tank.

Q. And then down into the sump in the forward end of the tank?

A. That is right.

Q. The discharge lines into the starboard tanks, are they taken off these lines?

A. They run directly off that line through the bulkhead.

Q. At what height are they taken off?

A. I should say about two and a half feet.

Q. Below the deck?

A. No, from the bottom of the tank.

Q. So that you have this line running from the deck down into the sump but about two and a half feet below its bottom you have a lead and a pipe line that runs right straight across into the starboard tank; is that right?

A. That is right.

Q. What size lines are those?

A. Ten inch.

Q. Now, are the lines that lead straight down from the deck, are they ten inch lines too?

A. No, I believe they are eight inch.

Q. So the line that runs across the tank is of bigger diameter than the line that runs down?

A. Yes.

The Court: Tell me, is that ten-inch line a line that hooks up with the intake lines?

[fol. 77] The Witness: Yes.

The Court: Does it reach from one tank to another?

The Witness: It runs from the—the two after tanks connect right up together with the center line bulkhead. That connects up with the 10-inch line.

The Court: Does the 10-inch line connect up with any line that runs up to the deck?

The Witness: With the loading line or the discharge line. It is reduced down.

The Court: So that the intake is eight inches, but when it reaches this line it is ten inches?

The Witness: Yes.

Q. The intake line, is that eight inches all the way to the bottom?

A. To the ten-inch line on the barge, yes.

Q. But when you take it off you have a connection that enables you to hitch on a ten-inch line to it?

A. Yes, it is a reducer, a permanent fixture.

Mr. Matteson: Do you understand it the way I do, your Honor?

The Court: I assume it is wider at the bottom than it is at the top, that is to say, you have an eight-inch line running down from the deck and when it gets down to this point it becomes a ten-inch line. There is some sort of a valve there, is there?

The Witness: A reducing fitting.

Q. A reducing fitting. As I understand it, the line that runs athwartships is a ten-inch line, and in hitching it onto the eight-inch line they use a reducer connection, is that it?

A. Yes.

The Court: I suppose the reducer connection is one that will take an eight-inch pipe at one end a ten-inch pipe at another?

The Witness: That is right, it is a bushing.

[fol. 78] Q. But the line that goes straight down on the port tank is of the same diameter all the way to the bottom?

A. I believe that is an eight-inch line.

Q. All the way to the bottom?

A. Yes.

Q. You can use this ten-inch line to the port and starboard tanks for equalizing?

A. To equalize the port and starboard tanks.

Q. Is there any arrangement by which you can equalize the forward tanks and the after tanks?

A. Not without using steam or you are loading from a ship.

Q. You would have to have steam on your pump in order to be able to pump in molasses out of the after tanks into the forward tanks?

A If you wanted to by-pass it from the forward tanks into the after tanks, you would have to use steam.

Q. Or vice versa?

A. Yes.

Q. If you wanted to move it from the after tanks into the forward tanks you would have to use steam?

A. Yes.

The Court: The one would take care of a list. You could take care of a list by the valves.

The Witness: Yes.

The Court: But in order to move any part of the cargo from the aft tanks to the forward tanks you would have to pump it, use your pump, and you would need some steam?

The Witness: Yes.

Mr. Matteson: Of course, it might or might not take care of a list. It might have the reverse effect.

The Court: It would depend on how you use it. If at the same time you used the valve you used your head, I assume you would make a proper transfer.

Mr. Matteson: If you had the same cargo on both sides and you had a list to starboard and you just opened the valve, you would increase the list.

[fol. 79] The Court: If you had a heavier load in the starboard that had caused the list, I assume it might equalize it.

Mr. Matteson: Yes.

The Court: I suppose these people know more about it than either you or I do.

Mr. Matteson: Yes, I am just trying to get the facts.

The Court: Apparently he has told us now that there is no way of equalizing between the stern or aft tanks unless you use the pumps. I understood from the testimony of Mr. Baldwin that you could equalize fore and aft without pumps.

Mr. Matteson: Yes, that was what I understood.

Mr. Erskine: I think what Mr. Baldwin meant was if you wanted to equalize or trim fore and aft you could open the valve and pump some into the other end, because I went back and asked him and he said there was no method of passing through the bulkheads, it would have to go through those pipes.

The Court: Well, at any rate, this witness worked on the barge for a number of years and I suppose you operated all these pipes during that time, didn't you?

The Witness: Yes.

Q. This connection with the ship, is that a flexible hose connection?

A. It is a flexible rubber hose.

Q. About what dimension is that?

A. Eight inches.

Q. Where does that run to, does it run up on deck or to some connection on the side of the ship?

A. No, over the rail on the ship.

Q. And connects to some fixture on the deck?

A. Yes.

Q. Did you see this barge after she was raised?

A. Yes, I was there when she was raised.

[fol. 80] Q. Where was she taken after she was raised?

A. Up to Guttenberg, New Jersey.

Q. And did you see her up there?

A. Yes.

Q. She was, I understand, so badly damaged that she was not considered worth repairing?

A. Well, she looked that way to me.

Q. What was the matter with her?

A. Her decks were all in and where the slings had been around her. The whole deck was all damaged right through, as far as I could see.

Q. Was there anything more than bent plates?

A. No, they were all bent plates, that is all there was; the pipe lines were broken.

Q. There were not very many plates bent?

A. I do not know what estimate was given on it.

The Court: Describe what you saw? You say that the deck was all in. Do you mean by that that the plates had been crushed and collapsed?

The Witness: No, they was not crushed at all. They were all bent in, down in. They had dropped about two foot, I should say.

The Court: What about the sides of the barge?

The Witness: The only damage on the sides was where the slings had been around it, where they lifted her up.

The Court: What did you notice there?

The Witness: On the sides and on the bottom all the plates were crushed in, which had made holes in them. She was taking water through them. And they put wooden wedges to stop the water from going in too fast. That was on both sides of the barge, and then on the top on the rail that was all crushed in.

Q. They raised her in slings, did they?

A. Yes.

[fol. 81] Q. And they carried her in the slings up to where she was drydocked?

A. No, sir.

Q. What did they do?

A. They pumped all the water out of her and put these wedges in her and she floated.

Q. And she was towed up there?

A. She was towed up there.

Q. Did you make any examination of the barge up there?

A. Up in Guttenberg?

Q. Yes.

A. No, I had seen all I wanted to see down where she was raised.

#### Redirect examination.

By Mr. Erskine:

Q. On my direct examination I asked you if you examined the boat on drydock and you said you did, and I asked you what was the condition of the sides other than the places where you identified the damage from the slings. I understood you to say the other parts of the sides were tight, is that right?

A. They were tight.

Q. How about the ends of the boat, what was the condition of tightness there?

A. It was absolutely all right.

Q. Did you see any explanation from your examination of any leakage before the sinking which would have accounted for the sinking?

A. No, sir.

Q. Was the "T. N. 73" equipped with what are sometimes called washboards—wash plates—what do you call them, wash plates?

A. Wash plates, yes.

Q. Describe them for us?

A. She had wash plates in each tank. They were about—the beams were about, I would say, about 12 inches high, and then the wash plate was right in the center of the tank. It was about three foot high.

Q. In the tank, as I understand it, this wash plate is a

beam about 12 inches high or wide, which runs across the tank?

A. Yes.

Q. In each tank?

A. Yes.

[fol. 82] Q. Are there more than one in the several tanks?

A. I would not say for sure. I know there is one in each tank.

Q. What is the purpose of the wash plate?

A. It is to stop the cargo from moving around too fast.

Q. In other words, if the boat were down by the head or down by the stern this wash plate across the cargo tank would check any movement of the cargo, is that it?

A. Yes.

Q. You described the pipes, the intake pipes, as running to the forward end of the forward compartments, is that right?

A. Yes.

Q. Those would be the pipes from which the cargo would subsequently be discharged?

A. Yes.

Q. Then as I understand it, you described the pipes in the after tanks as going straight down?

A. Yes.

Q. So that they would end at the forward part of the after tanks, is that right?

A. Yes.

Q. So that if you were to trim the ship in discharging the cargo so as to get all of the cargo out, which way do you trim her? By the bow or by the stern?

A. By the bow.

Q. How is that ordinarily done in getting out the last of the cargo?

A. You put water in the forward tank.

Q. What means is there for getting water out of the forward tank?

A. In the forward peak.

Q. That is, you put water in the forward peak tank and bring the boat down by the bow to enable these pipes to suck the last of the cargo out?

A. The run of the molasses.

Q. After that, and the boat is empty, how do you get the water out of the forward peak tank?

A. We usually use the steam pump on it. We have also got a hand pump.

Q. The water is pumped out?

A. The water is pumped out directly after the last shipment is finished.

### Recross-examination.

By Mr. Matteson:

Q. Do you have any means of pumping out of the cargo tanks except these cargo lines that you have spoken of; [fol. 83] do you have any bilge pumps or anything that you can pump out of the cargo tank with?

A. Bilge pumps, no, sir.

Q. I mean, if you had water in the cargo tanks as opposed to molasses, supposing you were washing down the cargo tanks and got water on the bottom of the tanks, how would you get it out?

A. We would use the steam pump.

Q. And what pumping line?

A. The same line.

Q. The cargo pump line?

A. Yes.

Q. You could get it out by that?

A. Yes. Well, up to a couple of pails, then we just take the rest of it out with pails.

Q. What connection is there between the peak spaces and the pump, you have a pump and line there, do you?

A. No, sir, we just have a steam siphon.

Q. How is that used?

A. From the steam line and connect up the steam on the siphon and throw a portable suction in the peak.

Q. It is a portable suction to get into the peak?

A. Yes.

Q. Another thing, this deck damage you are talking about, that was just at the after end, wasn't it?

A. Yes.

The Court: The deck what?

Mr. Matteson: The deck damage he spoke of. The damage to the deck of the barge which he saw after she was raised, that was just at the after end.

The Witness: It was over quite a spread. It was quite past midships on her.

Q. Yes, but it was at the after end of the after tank, wasn't it?

A. Yes.

The Court: When you say midships, how far up did that run? What do you mean by that? Did it run past the cabin?

The Witness: No, the cabin was about the center of the boat.

[fol. 84] The Court: It ran all the way up to the center of the boat?

The Witness: It ran all the way up to the center of the boat.

The Court. Had the center gone down?

The Witness: The cabin had already gone away. There was no cabin there. It was taken away with the suction.

The Court: What did they do, lift it off?

The Witness: No, the cabin got washed off.

The Court: What was the cabin made of?

The Witness: Wood. It was bolted to an iron frame.

Q. Just one other thing. I do not understand these wash plates. Do they come up from the bottom of the barge?

A. No, they come up to the top of the bottom. They have got fore and aft beams in each tank.

Q. Fore and aft beams in each tank, and these come down from them?

A. These come off the bottom on an athwartships way.

Q. Then how far do these wash plates project beneath the top of the tank?

A. I would say for about two and a half feet from the bottom itself, or about two foot from the bottom.

Q. And what are they made of? Are they thick plates?

A. The regular beams that is used in the boat itself.

The Court: No, but the plates. Counsel is asking you about the plates, are they separate from the beams or are they just additional beams, which are they?

The Witness: Additional beams.

The Court: What kind of beams?

The Witness: Steel.

The Court: I-beams or what, what shape?

The Witness: Like a T, a T-shape.

[fol. 85] Q. So these wash plates you speak of are the T projection, and the beam extended downward?

A. That is right.

Q. Are they present in every tank?

A. No, sir, I only recall seeing one in each tank, as far as I could make out.

Q. Where is that?

A. That is about the middle of the tank.

Q. And you estimate it comes down to two feet?

A. Around that, yes.

Q. From the top of the tank?

A. Yes.

Redirect examination.

By Mr. Erskine:

Q. Weren't there several of those wash plates in each tank staggered? Now, tell us your best recollection. If you do not recall, say so.

A. I do not recall it, sir.

Q. Have you seen other tank barges with these wash plates of similar type?

A. Yes.

Q. Is that a customary fitting?

A. Yes.

Q. I am not sure that I am clear about this matter of the pumping out of the peak tanks. You would not pump the peak tanks from the same pipe lines you discharged the cargo?

A. No, that is a separate line altogether, sir.

JOHN DERNELLE, recalled, testified further as follows:

Direct examination.

By Mr. Erskine:

Q. Captain, you described this morning the guard rail along the side of the "T. N. 73", and described it as about twelve inches down from the deck.

A. That is what it is.

Q. What is there at each end of the boat from deck down, what do you call it?

A. We have a bow fender and a stern fender running athwartships from the barge, port to stern.

[fol. 86] Q. About how far down below the deck do those fenders extend?

A. About three foot.

Q. Has it been your practice to load the "T. N. 73" by loading the bow tanks first?

A. Oh, yes.

Q. Is it possible to complete a full load of the bow tanks before putting any in the stern tanks?

A. No, sir.

Q. How far do you usually load the bow tanks?

A. You usually bring the molasses about half—bring the port fender down even with the water, the bottom of the bow fender.

Q. Is there anything else inside the tank which acts as a gauge of the filling of the bow tanks, that is, the extent you fill them before you start filling the stern tanks?

A. It was a practice to go by the ladder.

Q. Where is that ladder?

A. On each end of the tanks.

Q. What is it? Is it made fast to the skin of the tank?

A. No, it is seven separate rungs a foot apart from top to bottom.

Q. How far apart are those rungs?

A. About a foot.

Q. And when you have filled the normal portion into the forward tanks, before starting the stern tanks, how much of that ladder would be covered by the molasses?

A. I would say at the after end of the tank it would be about to the second step; of course a little bit more forward because of the list forward.

Q. Roughly what percentage would you say that would amount to, of the total normal load of molasses in the forward tank?

A. You would not have quite a third of a load yet.

Q. I do not know whether you understand what I mean. When you have put molasses in the forward tanks to the degree that you decide to load the stern tanks, how much would you have in the bow tanks of the total that you were expecting to put in there?

A. Oh, the forward bow tanks, about half.

Q. Were you on the vessel when she was drydocked in May, 1937?

A. Yes, I took her to drydock.

[fol. 87] Q. Was she put on a drydock or on a railway?

A. You mean for the repairs?

Q. Where was that?

A. Sparling's drydock, Astoria, Long Island.

Q. Were they able to get both ends clear of the water at once?

A. No.

Q. What did they do to remedy that?

A. He laid it out so that he could pull half of the barge on dry and leave the other half in the water, but to get either bow or stern up first he had to fill the opposite end of what was going on the railway to get it started on.

Q. You say you filled the opposite end. You mean to lift the end that was going on the railway you would put the opposite end down?

A. That is right, you would fill the opposite end to what was going up.

Q. In the course of this docking did they put both ends on the railway?

A. No, as far as he could go.

Q. I mean, did they change it then and put the other end on?

A. When he was finished with the bow he took her off and turned her around and put the stern on.

Q. How did they put the outer end down so as to lift the other end?

A. He had a small gas motor and he pumped whichever peak he wanted down, he pumped her full with the pump.

Q. So that when the boat got on the dock on either occasion there was water in the after peak tank?

A. That is right.

Q. That is, the outer peak tank?

A. That is right.

Q. Did you receive any new lines on the boat just before you went on your vacation?

A. I seen the equivalent of a hundred fathom of new line just a little ways before I went on my vacation.

Q. What did you do with that?

A. I cut them up into five separate lines and filed them away, and the day before I went on vacation I took three of them new lines and put them out and took the three old ones off and put them away.

[fol. 88] Q. So that when you left the mooring lines which you were using including three new lines?

A. That is right.

Q. Brand new lines?

A. Brand new.

Q. Do you know how old the other line was?

A. If I recall it correctly I put that line out just prior to being up in Peekskill, to have a new line out in the stream.

Q. All those lines were in what condition?

A. Very good condition.

Q. On this question of wash plates, was the "T. N. 73" fitted with them?

A. Yes.

Q. Do you remember how many there were in the different tanks?

A. There were seven of them in the forward tank and five of them in the after tanks.

Q. In each of the forward and each of the after?

A. Yes.

Q. How were they fixed, in line or staggered?

A. They were in line. They ran athwartships even distance apart from one to the other.

Q. About how far down from the deck?

A. We had the fore and aft beams, they were about eighteen inches high, and then we had the wash plates and they were not quite that high but close to it, I would say about 12 to 14 inches.

Q. What is the purpose of those plates?

A. Well, as was testified before, to prevent too much movement of the liquid, whatever you had in the barge.

Cross-examination.

By Mr. Matteson:

Q. These wash plates extend from one side of the tank to the other?

A. That is right.

Q. All the way across?

A. That is right.

Q. And I take it that they extend down from the deck about two to two and a half feet?

A. The top would be a little higher. The top of that wash plate, of course, would be higher. You figure on the bottom to be eighteen inches.

[fol. 89] Q. Eighteen inches from the deck?

A. No, from the deck up to the top of that, and then you had the wash plates running athwartships on that.

Q. Are these on the bottom of the tank?

A. Fore and aft, yes, they are on the bottom. They prevent the movement from port to starboard. Then you had the wash plates on top of them to more or less prevent it from——

The Court: And they come down from the deck?

The Witness: No, from the top of the fore and aft. They put these on top athwartships. Of course you have very little movement in between the bays anyway. You see, they call them bays. To be exact, you had seven fore and aft in each tank, so that meant they were only about two feet apart, to make up 18 feet athwartships.

The Court: Where did they come from, did they come down from the deck or from the skin?

The Witness: No, they were right from the bottom from the deck up. You have two decks.

The Court: What we want to know is, did they hang down from the under part of the deck?

The Witness: No, they were set fast to the bottom deck, to the bottom of the tanks.

The Court: That is, down at the bottom of the tanks?

The Witness: That is right, the longitudinals, the fore and afts were flush on the deck.

The Court: Where were the cross ones?

The Witness: They were on top of those, you see.

The Court: So that it looked like an egg box?

The Witness: That is right, you had sort of different compartments.

Mr. Matteson: It comes up from the bottom of the barge. [fol. 90] The Witness: From the bottom up. Of course I did not know what deck you were talking about. I am talking from the deck up.

The Court: You are talking from the ceiling of the boat?

Mr. Matteson: Sometimes they call it that.

The Court: You really have two decks.

Mr. Matteson: It is very confusing.

The Court: Well, that is one of the queer things. You might report that to Mr. Ripley, that the ceiling is at the bottom.

Q. You have got your fore and aft longitudinal beams?

A. Yes.

Q. And then you have got these wash plates set on top of them?

A. Right.

Q. Between the longitudinal beams and the two wash plates is there an opening?

A. Yes, just about a foot high into each bay, separated in the bays.

Q. But the bays are intercommunicating between the beams?

A. Oh, yes, fore and aft.

Q. And these things stand up about eighteen inches above the beam?

A. The longitudinal beams, yes.

Q. And the beams themselves are about a foot high?

A. No, it is from the deck down—from the deck up, the beams are eighteen inches high.

Q. The beams?

A. That is right. The athwartships run right on top of those.

Q. And they are eighteen inches high?

A. About that.

Q. So the top of the wash plate would be about 32 to 36 inches above, we will call it, the bottom of the barge?

A. That is right.

The Court: It is not exactly like the way they pack eggs, but if you took the cross section and moved it up to the top of the longitudinal section it would look something like that. [fol. 91] The Witness: It would be the same like looking at the railroad track, you have beams running underneath it.

— — —

JOHN JOSEPH TIGHE, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. In October, 1937, were you in the employ of the New York Tank Barge Company?

A. I was.

Q. You still are?

A. Yes, sir.

Q. How many years have you been employed by them altogether?

A. About seven years.

Q. And during the seven years what different kinds of work have you done for them?

A. In the seven years I was deckhand and captain.

Q. Of their barges?

A. Of their barges, yes, sir.

Q. Were you the captain of the "T. N. 73" at the time of this sinking in October, 1937?

A. I was.

Q. Who had you relieved as captain?

A. I relieved John Dernelle.

Q. This last witness who has just testified?

A. That is right.

Q. Who was on board the barge as mate when you joined it?

A. Lester Head.

Q. Had you known Lester Head before this during your work at this company?

A. I had.

Q. Had you worked with him before?

A. Yes.

Q. What had been your observations as to his competency and experience?

A. Very good.

Q. Do you recall where the barge was when you joined her?

A. Baldwin Avenue, Weehawken.

Q. That is one of your company's plants, is it?

A. No, at the Commercial Molasses.

[fol. 92] Q. And was she loaded or light when you joined her?

A. Light.

Q. Do you remember how many days that was before you went alongside the "Athelsultan"?

A. I was two days alongside.

Q. When ~~you~~ went aboard did you examine the boat?

A. I looked around to see if everything was all right and I found it all right.

Q. Did you find anything wrong with her?

A. No.

Q. Any evidence of any leakage?

A. None.

Q. Between the time you went aboard and the time of the commencing of the loading were you living on board?

A. No, from the time I went aboard—the first time I laid at Baldwin Avenue and I go home at evenings.

Q. But you were on her every day during that period?

A. Yes.

Q. Did you examine her in the routine way?

A. Every morning I went down and looked at her.

Q. Was there ever any evidence of any leakage?

A. None.

Q. On October 23rd did you see the boat inspected by Garpinello's inspector?

A. Yes.

Q. Did he make any statement to you that she was not all right?

A. No, sir.

Q. Were you on board when the boat went alongside the "Athelsultan"?

A. Yes.

Q. And when she commenced loading?

A. When she commenced loading, yes.

Q. Up to that time was there any evidence of anything wrong with the boat?

A. No, sir.

Q. When you went alongside the "Athelsultan" do you recall which side of your barge was next to the steamer?

A. The port side.

Q. And what lines did you put out?

A. The lines forward and two lines aft.

Q. Where did the after lines run from on your barge?  
[fol. 93] A. One ran from the inside corner of the port side and one ran from the outside corner.

Q. At the stern?

A. At the stern.

Q. And about how long were those lines to the point where they were made fast on the ship?

A. I should judge between twenty to twenty-five feet from the bitt down off the—

Q. Where did the lines run from on the bow of the barge?

A. From the bow corner to the ship and from the center bitt to the ship.

Q. The center bow of the ship?

A. Yes.

Q. How long were those lines?

A. They would be about the same.

Q. Was that in your experience a proper and customary manner of securing alongside the ship?

A. Yes.

The Court: Repeat that for me. You say there were two lines from the bow bitt?

The Witness: Yes.

The Court: One from the center bitt of the bow?

The Witness: Yes.

The Court: And the other from the—

The Witness: Port corner.

The Court: And the same thing at the stern?

The Witness: No, the stern was on the starboard corner and the one from the port corner to the—

The Court: From both the starboard and port corners you had a line running on the boat at the stern?

The Witness: Yes.

Q. At the stern the line ran from the two corners?

A. That is right.

Q. At the bow from the inside corner and the middle bitt?

A. That is right.

Q. Do you know what the conditions of those lines were?

A. Very good.

[fol. 94] Q. Do you know how they were?

A. From what I know, they looked to me as though it was the first or second time used.

Q. Do you know what size lines they were?

A. I believe they were 5½ inch lines.

Q. They were the customary type lines for this sort of work on tank barges?

A. We use 5½ inch and six-inch lines.

Q. Into what tanks did you commence to load?

A. Forward tanks.

Q. This barge is divided into two forward and two after tanks?

A. That is right, yes.

Q. That is, between the forward and the after tanks which were the larger?

A. I believe the forward tanks would be the larger.

Q. The steam and the power for the loading was furnished by the steamship?

A. By the steamship, yes.

Q. Were you familiar with instructions from the owner as to what would indicate a full load of molasses on the "T. N. 73"?

A. I was.

Q. What were those instructions?

A. I was instructed to load the barge two inches below the guard rail.

Q. The guard rail on the side?

A. The guard rail on the side, yes.

Q. How deep did that run down around the edge of the deck?

A. About twelve inches.

Q. On either end of the barge was there what is called a fender?

A. Yes, there was a fender.

Q. How far down did that extend below the edge of the deck at the end?

A. About three foot.

The Court: Describe that for me, please?

The Witness: What would you want?

The Court: Just the fender at either end of the barge, what did it look like?

The Witness: There were two boards so wide, right athwartships.

[fol. 95] The Court: Wooden boards?

The Witness: Wooden planks like I should judge they were about two inches thick.

The Court: What was the purpose of those?

The Witness: For bumping up against anything, for protecting the bow and the stern of the barge.

The Court: Oh, I see, they were over the stern.

The Witness: They were right on up against the stern. They were nailed right to the stern.

The Court: They were not on the deck?

The Witness: No, no, they were right in front of the barge.

The Court: Over the stern and over the stem.

The Witness: That is right, they were attached right to the stem.

The Court: And they were how far over?

The Witness: They went down about three foot.

Q. Is that an estimate or an exact measurement?

A. That is an estimate.

Q. You say you started the loading on this evening into the forward tanks?

A. Yes.

Q. Was there anything unusual in starting the forward tanks?

A. No, nothing unusual.

Q. Is that the customary way of doing it?

A. The customary way of starting it.

Q. When you say you started by pumping into the forward tank, I take it you mean at that time you were not pumping anything into the stern tanks?

A. There was not anything going into the stern tanks.

Q. What did you do after the loading commenced, you yourself personally?

A. After the loading commenced I looked around and seen everything was all right, and I went into my cabin.

Q. Just a minute now, where is your cabin?

A. On the after end of the barge.

[fol. 96] Q. What happened after that?

The Court: When was this, what time of day or night?

The Witness: That was about, I should say, nine-thirty P. M.

Q. What happened after that, captain, about yourself, I mean, what were you doing?

A. I was having a smoke there and a friend of mine came and visited me and we were talking there for a while, and he says he was going—he was the captain of a tug—he was going up to Baldwin Avenue and he would be back for me, so he went and I finished smoking a cigarette and then I went to bed.

Q. Who was in charge when you went to bed or when you first went into your cabin?

A. My mate was in charge then.

Q. What sort of a night was it as to temperature?

A. Well, it was not too cold—medium.

Q. How would you describe it, warm or cold?

A. It was cold enough to have a coat or sweater on.

Q. When you went to bed did you go to sleep?

A. Well, I did not go right to sleep. I laid there for about a half hour and then I dozed off.

Q. What awakened you?

A. I am not a very heavy sleeper at home even. The least thing wakes me up, and I woke up and I looked out

the window and everything seemed all right, and I lit another cigarette, and half finished that and I put it out and dozed off again. I do not know how long I was dozing, when I heard the splash of water. I thought it was the tug coming back, and I rised up to look out the window, and I saw nothing but water.

Q. What did you do then?

A. I jumped out of the bunk and I landed in water.

Q. In the cabin?

A. In the cabin, and I started towards the door, and when [fol. 97] I got near the door the mate was coming to the door to call me. And I got out of the cabin and I was up, pretty near up to my chest in water at the time, and I told the mate to follow me, and we went up to where it was dry on the barge, and I asked the mate what valves he had open and he told me, and I told him to close them.

Q. What did he tell you?

A. He told me the after valves was open, and I told him to close them. As he went over to close them the barge took a dive.

Q. Wait a minute. You say the barge took a dive. Which end of her took the dive?

A. The stern of her.

Q. You mean the stern went down?

A. The stern went down.

Q. When you say took a dive, what do you mean?

A. A sudden lurch down.

Q. A sudden drop?

A. Yes.

Q. Then what happened?

A. As he was walking to close the valves she took this drop and I called him back. I seen that it was no use, and we went up on the ship.

Q. You told us that when you first got out of the cabin and you met the mate and you went up to here in water and it was dry on the barge—how far forward on the barge was it?

A. About amidships.

The Court: You went up on the ship, you say?

The Witness: I went up on the ship, yes.

Q. Then when it took the drop you described, the deck went further under water?

A. That is right.

Q. And then you and the mate went up and boarded the ship?

A. That is right.

Q. By the time you get on the ship how much of the barge would you say was under water?

A. It was about half of it then.

Q. That is, complete<sup>1</sup> under water?

A. Yes.

Q. Where was the after hatch into the cargo spaces [fol. 98] located?

A. The after hatch was located right aft of the cabin.

Q. That is, stepping out of the after end of the cabin you would be up at the hatch?

A. That is right.

Q. When you turned in that night, or when you commenced loading, or up to the time you turned in, was that hatch dogged down?

A. No.

Q. Do you know what the condition was of the side hatches?

A. The side hatches was open.

Q. Were they located on top of the thwartships bulkhead?

A. That is right.

Q. And in your experience is it the practice to keep those hatches open while you are loading?

A. Yes.

Q. Why is that?

A. So you can look down the tank quick, you would not have to lift the cover up.

Q. From the time that you came out on deck when you were awakened and found water, was there any means available to you to save any of the molasses that was on the barge?

A. No, sir.

Q. Did you have any means at all of pumping the cargo back out of the barge into the ship?

A. No.

Q. When you got out on board the ship did you have any conversation with the ship's officers?

A. I did.

Q. What did you say to them?

A. I asked the ship's officers could we make a suction

out of his pump and he said he did not think so, and we went in the areaway and looked at the chart and found out we could not make a suction out of his pump.

(Adjourned until October 27, 1938, at 10:30 A. M.)

[fol. 99]

New York, October 27, 1938;  
10:30 A. M.

### Trial Resumed

JOHN JOSEPH TIGHE resumed the stand.

Direct examination.

By Mr. Erskine (continued):

Q. When we adjourned yesterday, Captain, I was asking you about your conference with the ship's officers who investigated and reported that they could not make a suction out of the ship's pumps.

A. That is right.

Q. At that time was there any way that you could use the barge's equipment to pump the molasses back into the ship?

A. No, there was not.

Q. I think you told me yesterday that the pumping into the forward compartment had commenced before you turned in or went to your cabin?

A. That is right, yes.

Q. Have you any recollection what time it was that you commenced to load into these forward compartments?

A. I have an idea it was between nine and nine-thirty.

Q. You did not make any exact note of the time?

A. No, I did not.

Q. Did you make any exact note of the time when you were awakened and came out and found the stern under water?

A. After I came out I asked them on deck what time it was.

Q. And what were you told?

A. It was just past 1:06 or 1:07 A. M.

Q. When the stern went under water did the bow go down immediately?

A. No, it did not.

Q. What was holding it?

A. I believe the lines were holding, and the lines from the ship, that is the pipeline, the hose.

The Court: At the bow?

The Witness: Yes, sir, and the stern also I believe.

[fol. 100] Q. Some time afterwards did the bow go under?

A. The bow went under at 6:00 A. M. and settled to the bottom.

Q. What happened to the pipeline then?

A. It gave way.

Q. And the bow line, what happened to that?

A. I don't know; I didn't look to see what happened to the line; I just saw some of it hanging on the side of the ship.

Q. Did you subsequently cut any of those lines?

A. No, I did not. I went sent home about eight o'clock in the morning.

Q. These cargoes which you were experienced in carrying on the tank barges have different densities, have they; that is, some will weigh more with less volume and others will have more volume with the same weight?

A. That is right; yes, sir.

Q. With a cargo of molasses how would you describe that; is that a lighter or heavier type of cargo?

A. I believe that was a heavier type of cargo.

Q. With a cargo of molasses when you had a load giving the freeboard you have described which you would consider a safe load, would the molasses fill up the whole of the cargo space right up to the deck?

A. No, it would not.

Q. Can you give me any rough estimate as to how far below the top of the deck a normal load of molasses will come?

A. That is, what we would consider a load?

Q. Yes.

A. I would judge about three feet from the deck down.

Q. With your experience would you say you had found the freeboard which you described for what you consider a full load of molasses would be a safe and proper freeboard?

A. Yes, it would; yes, sir.

Q. From the time you commenced loading and went into your cabin and when you came out on deck again, after

the stern started to sink, had you any knowledge of any [fol. 101] officer of your company being on the barge?

A. Not at that time. As I came out of the cabin and got on the ship—

Q. That is the time I am talking about. Up to that time had any officer been on the barge?

A. No, sir, he was at Baldwin Avenue.

Q. Who are you talking about?

A. Charles Neill.

Q. He is the port captain?

A. Yes, sir.

Q. I am talking about an officer of the company like Mr. Baldwin or some other officer of the company. Were any of those men on the boat?

A. No.

Cross-examination.

By Mr. Matteson:

Q. According to the record which I have the pumping into the barge from the ship of the cargo began at 9:05 P. M.; would you say that was about correct?

A. No, I would not say it was correct. It was between 9:00 and 9:30. I have the idea of that.

Q. You cannot say what time it was?

A. No, I cannot.

Q. Then if the man who was there and taking the time said it was 9:05, you would not dispute that?

A. No, I would not dispute it.

Q. Now at the time you went to your cabin had the preliminary loading of the forward tanks been completed; in other words, had you shifted the loading from the after tanks or were they still loading in the forward tanks?

A. Still loading the forward tanks.

Q. And from the time you went into your cabin until you came out and found the stern submerged, you do not know about anything that went on on deck?

A. No, I do not.

Q. I think you said yesterday that you went to your cabin at approximately 9:30, approximately that time?

A. Yes.

Q. Did you have any means of keeping time on the barge? [fol. 102] A. The mate had a wrist watch laying on the table. That was the only timepiece we had on the barge.

Q. You noticed by that that it was about 9:30?

A. No, I did not notice by the watch at all. I did not look at the watch.

Q. The mate, Mr. Head, whom you left in charge on deck, I think you said he is an experienced man?

A. Yes, sir.

Q. And you regarded him as thoroughly competent to oversee the loading of the barge and take your place for that purpose?

A. Yes.

Q. He is still employed by the company, is he not?

A. He is still employed by the company.

Q. What is his position now?

A. His position, he works in the plant in Guttenberg just now.

Q. He works what?

A. In our plant in Guttenberg.

Q. Has the barge "73" been replaced or——

A. I am not familiar with that.

Q. I mean, you have one less barge operating now than you did have when you had her?

A. Yes.

Q. So you have not room for quite so many men on the boats?

A. May I withdraw that answer?

The Court: Explain your answer if you answered it incorrectly. State what the correct answer is.

The Witness: We have a new barge built. It was being built at the time that the accident happened. I do not know whether that has taken the place of the "73". It came out after this accident happened.

Q. What barge are you on now?

A. I am not on any particular barge now. I go from one barge to the other. It is according to what barge is working or is sent out to work.

Q. Was that the situation at the time of this accident, you had no particular barge, or were you working on a [fol. 103] particular barge, or were you just moving about from barge to barge?

A. No, that was not the situation then.

Q. Did you have a regular barge at that time?

A. I did, yes.

Q. What barge was that?

A. I was mate on the "No. 4" at that time.

Q. What was the draft when she was light before loading started?

A. I should judge 8 feet above water.

Q. Her sides were 8 feet above water?

A. Well, about 7 or 8 foot. She might have drawn 6 inches, 8 inches of water.

Q. I see. Well, in other words, her draft, the submerged part of the boat when she is light is about 6 or 8 inches?

A. I should judge that. It might have been more or less.

Q. This barge has square ends, hasn't it, like a carfloat?

A. Yes, it has square ends.

Mr. Erskine: You are referring to the corners or to the rake?

Q. No, I am referring to the decks, looking down at her on top her ends are square?

A. That is right, yes.

Q. And then on the stern she goes down for a distance and then the rake starts, and she is cut away forward or from the bow end, is that right?

A. Yes.

The Court: She is raked at both ends?

The Witness: That is right, yes.

Q. She is approximately the same on both ends, isn't she?

A. That is right.

Q. On the stern above the rake you have this bumper that was described by one of the witnesses yesterday?

A. That is right.

Q. That just covers the stern or the bow down to where the rake begins, doesn't it?

A. That is right, yes.

[fol. 104] Q. And counsel told us yesterday that it was 23 inches from the bow down to where the rake begins, so that would be the width of the bumper, would it not?

A. 23 inches from the bow to the top of the deck.

Q. Mr. Erskine told us yesterday that the square part of the stern before the rake begins, from the bow down to where the rake begins, is 23 inches, or the stern, and the bumper is fastened on to that?

A. Yes, that is right; yes.

Q. So the bumper would have the same dimensions as that part of the barge from the deck down to where the rake begins?

A. Yes.

Q. If that is 23 inches, why, that is what the bumper is?

A. Yes.

Q. When you have a full load on the "73", can you tell us what it is in terms of tonnage, how many tons does she carry?

A. No, I could not tell you.

Q. Isn't it a thousand tons that she carries?

A. I could not tell you how many tons she carries when she has got a full load.

Mr. Matteson: Will you agree with that, Mr. Erskine, that a thousand tons is the carrying capacity of this boat?

Mr. Erskine: My information is that it is something less than a thousand.

Q. As I understand it when you found that the barge was in trouble and you went on the ship, you asked the mate if they could arrange their pumps so as to suck some of the cargo back into the ship?

A. That is right, it was the third officer.

Q. And you thought that if that could be done that the conditions could be remedied, is that right?

A. That is what I thought, yes.

Q. And if you could pump the cargo back out of the stern into the ship, the barge would come up?

A. That is what I tried to figure out.

[fol. 105] Q. But you could not do it because the pumps of the ship could not suck?

A. I could not find no way of making a suck.

Q. And you had no steam available on your own boat?

A. None.

Q. And you could not transfer cargo from the after compartment to the forward compartment without steam on your own pumps, could you?

A. No.

Q. So there was nothing you could do when this emergency came up but let nature take its course, is that all?

A. That is right.

Q. There is one thing I want to clear up that I am not quite sure about. Is the deck of this barge higher in the

middle part of the barge than it is at the edges of the barge? There was some talk here about a camber at the edges.

A. There is a difference of a couple of inches. I do not know just how much.

Q. So that as I understand it the barge is flat across the top until you get about two or three feet from the edges, and then it slopes down. I think they said the camber was about four inches, is that right?

A. That is about right, yes.

Q. Then when you come to the edge of the barge the guard sticks up, is that right? The guard sticks up above the edges at the extreme edge of the barge?

A. Sticks up above the deck of the barge?

Q. Yes.

A. It does not stick above the edge, it goes with the slope. The guard itself does not stick above the edge of the top of the deck.

Q. Well, then, when you come to this sloping edge, there is nothing to keep anything from slipping or running off of the edge of the barge, is that it?

A. No, no.

Q. Nothing there?

A. No.

Q. Isn't there some sort of a trough or something that runs along the edge, sort of a waterway, or something of that kind?

A. You could call it a waterway, but it is just like an L-shape.

[fol. 106] Q. Well—

A. It is not a well, because it comes down and just comes over about an inch.

The Court: Suppose you take a sheet of paper and show us how the deck slopes there and what there is at the point where the deck meets the side of the barge?

The Witness: I will just make this a square. I am not very good at drawing.

The Court: No, no; just draw the deck, that is all we want. Just imagine—here.

Q. Just draw a line.

The Court: There is a straight line. You see, that represents the deck. Now, you show us how the deck slopes

and what there is at the end of the slope on the side of the barge.

The Witness: The deck starts sloping in in here, about here.

The Court: No, no; here is where it starts sloping. That is the even part of the deck. Now, you just draw the slope.

The Witness: Down about that much, and then down again just so the water will run off the barge.

Mr. Erskine: Draw it, Captain; can you draw it?

The Court: Will you draw it, Mr. Erskine, if you know what it looks like.

Mr. Erskine: I am not sure.

The Court: Do you know what it looks like, Mr. Matteson?

Mr. Matteson: No, that is what I am trying to find out.

(The witness draws.)

The Witness: It is not round there. It just comes down [fol. 107] almost square and it slopes down like that a couple of inches.

Mr. Erskine: What we would all like to know is when the deck starts to slope then does it finish on the side, or is there any waterway or depression there.

The Witness: No, there is no depression there. It just slopes right down. It goes out about that far, two inches, and then this guard rail fits right in there.

The Court: Well, there is a guard rail, is there?

The Witness: Yes, that is where the 12-inch guard rail goes.

Mr. Erskine: That guard rail is on the outside. Where would the guard rail be there?

The Witness: It would set right in there and would extend out just another two inches. Then the guard rail would fit in there.

Mr. Erskine: The witness indicates that would be the guard rail. Is that approximately the way the side of the deck looks?

The Witness: That is approximately the way it looks.

The Court: What is the guard rail for, to protect the sides of the boat?

The Witness: To protect the side of the boat so when you go alongside of a ship or a dock, that is the first thing it hits.

The Court: Will you mark that "guard rail", then, and

the various parts of the deck, and run the sides of the barge down to the deck too.

Mr. Erskine: I will mark this "camber".

Mr. Matteson: Yes, that is right.

(Marked Exhibit A.)

[fol. 108] Q. What is the guard rail made of?

A. I believe it is made of oak wood.

Q. What keeps you from falling off the side of the barge when you walk along that?

A. There is nothing to keep us from falling off.

Q. Do you have a hand rail?

A. No.

Q. And there is no bulwark?

A. No.

Q. Are the ends of this barge any higher in the middle?

A. They are an inch or a couple of inches.

Q. No more than that?

A. No more than that, no.

Q. So when you load her to within 14 inches of the deck amidships that is within two or three inches of being her freeboard at the ends too?

A. I would not say that, no, it is a little higher on the ends.

Q. That is just what I am asking you. Suppose she is on even keel fore and aft and you have a 14-inch freeboard amidships, how much will you have at her ends?

A. About 16 inches, according to the slope of the ends of the barge.

Q. That would be a difference of about 4 inches at each end?

A. That would, yes.

The Court: Two inches.

Mr. Erskine: The witness is referring to a sheer.

The Witness: The sheer on the front of the barge.

Mr. Erskine: Where the ends come up a little.

The Court: Yes, he said it was two inches. You add two inches to fourteen.

Mr. Erskine: I am going to have a surveyor on as the next witness, who will say there was practically no sheer at all, that it was almost a flat deck.

The Court: Well, he said it was a couple of inches.

Q. Now, you have these peak tanks at each end of the barge?

A. Yes.

Q. Is the only opening into these peak tanks the hatches?

A. That is all.

[fol. 109] Q. So when the hatches are fastened down the peak tanks are tight, is that right?

A. Yes.

Q. Air and watertight?

A. That is right.

Q. Now I understand that the hatches on this barge on this night when the accident happened had been closed but not dogged, is that right?

The Court: Which hatches?

Mr. Matteson: All of them.

Mr. Erskine: I object to that; he did not testify to that.

Mr. Matteson: If that is not the fact then I have been misled by your answer to the interrogatory.

Mr. Erskine: I can show you in the testimony——

Mr. Matteson: I do not care about your testimony, I am concerned with your answer to the interrogatories.

The Court: Well, I am concerned with the testimony.

Mr. Matteson: Naturally, if your Honor pleases, I am too, but I am basing my question on the answer to the interrogatory.

The Court: My recollection is that the testimony was that the hatches to the peak tanks were not only down but dogged as well.

Mr. Matteson: There was one witness who said that, but that relates to some time prior to the time I am talking about. I am talking about the time of the accident. He was talking about a preliminary explanation.

The Court: This is about the time of the accident too, the testimony that was given. That is my recollection of it. I may be wrong.

Mr. Erskine: The last question went to the cargo hatches, if I recall it, did it not?

The Court: No, his last question related to all the hatches, which included the peak hatches.

[fol. 110] Mr. Matteson: Yes. If your Honor pleases, I am cross examining this witness and I am basing my questions on an answer to the interrogatories that is on the record. In the petition it was alleged that this barge filled

through her hatches and deck openings. We directed an interrogatory to the petitioner and ask him to specify what hatches and deck openings this barge had and which were open and which were closed at the time of the accident. The interrogatory came back and said that the hatches were closed but not dogged, and that is the basis of my question to this witness.

Mr. Erskine: I will admit that is correct, that in the answer to the eighth interrogatory I did prepare the answers for the answers' verification, that up to the time of the sinking the side hatches and the stern hatch were closed but not dogged. Now, the man who was on the barge, I think this witness testified yesterday that the stern hatch was closed and not dogged, but the side hatches were open. If that is the fact I will simply have to stand on his testimony.

Mr. Matteson: Then I take it that in your answer to the interrogatory in which you are required to state what hatches and deck openings there were and which were open and which were closed, you made no mention of these peak hatches, is that right?

Mr. Erskine: Yes, my recollection is that the question related to cargo hatches. I do not think that related to deck hatches.

Mr. Matteson: No, it related to all hatches and deck openings and used exactly the language you have in your petition.

Mr. Erskine: I think that the witness should not be blamed for my misunderstanding.

Mr. Matteson: I would like to get the point aired here a [fol. 111] little bit, because I think the answer is certainly less than frank and not adequate, if you evaded the thing by omitting some hatches.

The Court: Well, see what the question was and what the answer was.

Mr. Matteson: The answer to the eighth interrogatory is attached to our answer, and it refers, if your Honor pleases, to the language of the petition, which I would like to refer to first.

The Court: I will read it now; just a minute.

Mr. Matteson: If you will refer to the fourth paragraph of the petition first.

The Court: Evidently your question was, State what deck openings or hatches there were on the deck of the barge

“T. N. 73”, the arrangement, location, dimensions, means of covering each, stating how much open and how much closed or covered at the time it was discovered that the barge “T. N. 73” was sinking.

Mr. Matteson: I have used exactly the language that was used in the allegation of the petition, which is as follows: “Fourth paragraph of the petition, in which it is alleged that the only possible conclusion is that the sinking was caused by water getting into the barge through the deck or hatch openings. I used the exact language that he did.

The Court: Well, all right. He speaks in his answer of hatches, but I think the testimony yesterday covered not only the hatches mentioned in the answer but also certain covers or openings I should say into the peak tanks in which no cargo was stored, and which were evidently for the purpose of keeping the vessel afloat.

Mr. Matteson: Right.

The Court: Now his answer to the 8th interrogatory relates to hatches.

[fol. 112] Mr. Matteson: That led me to believe that the only openings were the cargo hatches he was talking about.

The Court: That has been corrected by the witnesses; they have stated what the barge had in the way of deck openings, and in addition to the hatch openings into the tanks that took the cargo apparently there were some hatch openings into the peak tanks.

Mr. Matteson: I want to register my protest against that method of answering interrogatories.

Mr. Erskine: How has it misled you?

Mr. Matteson: I was led to believe that the only openings in the barge were the ones you specified in your answer.

Mr. Erskine: How has that misled you?

Mr. Matteson: Because now you come in with testimony about hatches in peak tanks.

The Court: The answer specifies that the openings were not dogged down; the hatches over the peak were dogged down.

Mr. Matteson: That was one witness.

The Court: Yes, one witness, but I have not heard any testimony to the contrary.

Mr. Matteson: We are not very far along with the trial yet.

Mr. Erskine: It is clear from the testimony and the plead-

ings that I was talking about the cargo hatches both in the petition and the answer. I spoke about the four hatches, and I will have to take the responsibility myself in speaking about the manholes in the peak tanks. This witness testified yesterday that the stern cargo hatch was down but not dogged, and the two side cargo hatches open.

I move to amend the answer to conform with the present proof.

[fol. 113] The Court: If that is necessary we will consider it later. From what I have heard of the testimony I am clear as to what hatches were dogged down and which were not.

Mr. Matteson: I register my protest to this evasive way of answering interrogatories. I asked for them all.

The Court: I can see something to your point. It has developed that in addition to these hatches there were other hatches open. But, if other hatches were dogged down—

Mr. Matteson: That assumes something that has to be proved. Here is a case where we as cargo owners know nothing about what goes on, and we ask in our interrogatories.

Mr. Erskine: May I interrupt? Mr. Garpinello was there. My understanding is that Mr. Garpinello's representative was there on the ship during the entire loading of the barge.

Mr. Matteson: He was, but he has nothing to do with these people.

The Court: All right then, gentlemen, we will proceed. You have your statement on the record and we will proceed.

Mr. Matteson: I withdraw the last question, and will reframe it.

The Court: Yes, reframe a new question.

Q. Now I understand that the side hatches were open when you left the deck?

A. Yes, sir.

Q. And that the stern hatch which leads into the cargo hold was—the lid was put down but it was not dogged?

A. Yes.

Q. And when it was not dogged it is not watertight, is it?

A. No.

Q. Now I think you testified that the density of the various cargoes which you carried vary a great deal?

A. Yes, sir, they do.

Q. So that what the boat can carry is determined by the weight rather than the quantity, isn't it?

A. That is right.

Q. So that with some cargoes your tanks will be only half full?

A. Yes, sir.

Q. And in some cases they might even be less than that?

A. Yes, sir.

Q. So that the soundings that you took or the depth you observed of the cargo in the hold does not mean very much to you, does it?

A. No.

Q. The thing you have to load your barge by is your observation as to her draft and her trim, is that right?

A. That is right, yes, sir.

Q. And now let me ask you this: When you are transporting cargo after it has been loaded and you have left the dock I assume that you dog the hatches down?

A. Yes, they are dogged down.

Q. After the hatches are dogged down how can you sound the cargo load to determine whether there is leakage or any change in the cargo?

A. We can not sound them.

Q. Don't you have little fixtures in the hatch covers you can remove so you can stick a sounding pole down?

A. They are there but we never remove them. They are only air vents.

Q. But you can open them?

A. Yes, sir.

The Court: You have to remove the vents?

The Witness: Yes, sir.

The Court: What do they look like?

The Witness: They are a short nipple, and there is a screen in it and a gooseneck. There is a law that requires an air vent.

The Court: How are they attached to the deck?

The Witness: They are screwed in the top of the hatch covers and when the hatch cover is open they are too.

[fol. 115] Q. The screen you have to have when you are carrying explosive cargo.

A. Since this new law came out we have to have them on all barges.

Q. The purpose of the screens is to prevent a flash back into an explosive material in the tanks?

A. Yes, sir.

Q. And you can by unscrewing these vents take soundings of the cargo through those openings?

A. Yes, sir.

Q. And after the soundings are taken you could screw the vents back on again.

A. That is right, yes, sir.

Q. Now after you went on the ship you had a conversation with the mate of the ship, didn't you?

A. Not the mate, no.

Q. The third mate?

A. The third officer.

Q. One of the officers of the ship that was there on the deck?

A. Yes, sir.

Q. That was the officer at the time in charge of the vessel?

A. Yes, sir.

Q. And was Mr. Garpinello there or his man?

A. His man was there.

Q. Was Mr. Garpinello there at any time before you left the ship?

A. Before I went home, yes.

Q. Do you recall the conversation that you had with Mr. Garpinello and the officer of the ship with respect to the amount of cargo that was discharged in the "No. 73"?

A. He just asked me about how much I figured upon in there.

Q. And you three talked it over and as a result of that conversation the third officer prepared a little certificate as to the loading into the barge?

A. Not to my recollection he didn't.

Q. Isn't it a fact that you agreed between you at that time that the discharge of the cargo into the barge was approximately 165,000 gallons?

A. No, sir.

Q. What did you tell Mr. Garpinello or the officer about the discharge into the barge?

A. Mr. Garpinello asked me how much I thought was in the barge and I told him about fifty or fifty-five or sixty thousand gallons.

[fol. 116] The Court: 150?

The Witness: Fifty, fifty-five or sixty thousand gallons.

Q. How did you arrive at that?

A. That was approximately the molasses that was in there.

Q. At that rate you had been discharging approximately four hours—or, rather, loading approximately four hours at the time the accident happened?

A. That is right.

Q. At that rate it would have taken you around twelve hours to have gotten a full load.

A. That is right.

Q. At that rate it would have taken you around twelve hours to have gotten a full load.

A. That is right, yes.

Q. And do you disagree with Captain Dernelle of this barge, who agreed with me yesterday that a normal loading time for this barge would be 4 to 4½ hours?

A. I disagree, yes.

Q. How did you get at the figure of fifty or sixty thousand gallons?

A. I got that figure that way from the length of time it took the "No. 78" to pump and the length of time we were pumping.

Q. I see. And what time did it take the "78" to pump?

A. I believe the "78" started a little after noon and finished at eight o'clock or a little after eight.

Q. How much did she take?

A. I don't know.

Q. If you don't know how much she took how could you figure on that basis as to what you were taking?

A. Just as I said it took us from the time we started to load until the time she was under water.

Q. How much would you assume that the "78" took?

A. I would assume the "78", I would say 168 or 170,000 gallons.

Q. That you would consider a normal load for her?

A. Yes, sir.

Q. And that would be a normal load for you?

A. Yes, sir.

Q. Do you disagree with Mr. Baldwin the president of the company that a normal load for these barges would [fol. 117] be from 175 to 179,000 gallons?

A. No, I don't disagree with him.

Q. But you still say a normal load would be not over 165,000?

A. In my opinion it would be if I was loading the barge.

Q. You didn't go by gallons anyway, did you?

A. No, sir.

Q. Did you tell Mr. Garpinello or Mr. Garpinello's man or the third officer of the ship—

The Court: Will you specify which one?

Mr. Matteson: I don't know, they were all there.

The Court: Start with one of them.

Q. Did you tell the third officer of the ship that you expected that the barge "73" would have completed her load by 1:25 or 1:30 or thereabouts?

A. Between one-thirty and two o'clock, that is what I told him.

Q. To whom did you tell that?

A. The third officer and Mr. Garpinello.

Q. When did you tell them that?

A. After Mr. Garpinello got there.

Q. Are you sure you didn't say one-thirty?

A. No, sir, I did not.

Q. I show you this statement that was written out by the third officer I am told at the time and ask you if you ever saw that—if you saw that when it was written out?

A. I never seen that before or a statement like it.

The Court: Mark it for identification, please.

(Statement marked Claimant's Exhibit B for Identification.)

The Court: You didn't see it that night or that morning?

[fol. 118] The Witness: No, sir, this is the first time I seen a statement like that.

Q. Did you hear the third officer say that he assumed that there had been loaded in this barge approximately 165,000 gallons?

A. I didn't hear him say.

Q. Did you hear him give any estimate?

A. No, sir.

Q. Did you hear Mr. Garpinello make any estimate?

A. No, sir.

Q. Or Mr. Garpinello's man?

A. No, sir.

The Court: On this point, I am not a jury. Why can't you work it out? You know just what the ship was supposed to have in its hold, and you know what went out of it into ether barges. You can probably take what was left from the total shipment on board as to what had gone on this barge, or approximately what was left. And then you can get pretty close to it and we can then say whether it was around 155,000 gallons. Of course you have the other method of revolutions of the engine in pumping.

Mr. Matteson: If your Honor please, in spite of our stipulation I did bring Mr. Garpinello here and he is prepared to make the calculation both ways.

The Court: All right, that will be helpful.

Q. You said your barge began loading about 9:30?

A. Between nine and nine-thirty.

Q. And you figured she would be through between one-thirty and two?

A. Two o'clock, yes, sir.

Q. So that you figured that she would load from 9:30 to 1:30, that would be five hours to five and a half hours?

A. That is right, yes, sir.

Q. No, that is four to four and a half hours. Isn't that right?

A. Yes.

[fol. 119] The Court: Yes, I was going to say you mis-spoke.

Q. And this accident occurred between one and one-thirty.

A. One and one-ten.

Q. At that time he had somewheres between half and three-quarters of an hour to go to get a full load, didn't he?

A. Yes, sir.

Q. So at that time he certainly must have had over three-fourths of her full load on.

A. If you figure like that,—the way the barge was lifted—the barge was like that (illustrating) with the bow up and the stern under water and it was hard to figure that out.

Q. You didn't say you were basing your calculations on the trim of the ship, you said you were basing it on time.

A. I did, yes, sir.

Q. But the time doesn't work out your way, does it?

(No answer.)

The Court: Now with those facts that counsel has called to your attention, is it your recollection now that you told the third officer of the ship that the barge had on board 150 or 155, 160,000 gallons instead of fifty or fifty-five or sixty?

The Witness: I never told the third officer anything. The only conversation I had with him was about making a suction out of his pump.

The Court: You said a little while ago you told him it was fifty-five.

The Witness: That was Mr. Garpinello.

The Court: The third officer was present at that time?

The Witness: I didn't notice whether he was or not.

The Court: Yes, it was Mr. Garpinello. Apparently you were wrong in that estimate.

[fol. 120] The Witness: In that estimate, yes, sir.

The Court: You must have been. Next question.

#### Redirect examination.

By Mr. Erskine:

Q. Did you have any knowledge yourself as to how much was aboard at the time you came out and found the stern under water?

A. No, sir, I did not.

Q. In answering Mr. Matteson you said that the fender at the bow and stern end would be the same depth as a straight part of the hull down to where the rake started. Do you know whether the bottom ends of those wood fenders were gouged off right at the turn of the rake, or whether they extended below it?

A. That I could not answer; I never noticed.

WILLIAM R. JEFFCOTT, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

#### Direct examination.

By Mr. Erskine:

Mr. Erskine: Mr. Matteson, will you stipulate Captain Jeffcott's qualifications as a marine surveyor?

Mr. Matteson: Yes.

Q. Captain, did you see the tank "No. T. N. 73" on dry-dock some time after October 24, 1937?

A. Yes, I did.

Q. Are you connected with the Insurance Company of North America?

A. Yes.

Q. Did you know another surveyor connected with that company named Mr. Hansen?

A. Yes.

Q. Do you recall the exact date that you yourself saw this barge on the dock?

A. No, I do not recall now. It would be mentioned in my report.

[fol. 121] Q. Will this document throw any light on it?

A. Yes, it states it was on November 4th.

Q. Is this document you just looked at a memorandum made by you?

A. Yes.

Q. When you saw the boat at the dock on November 4th, had she already been surveyed according to your information?

A. Yes.

Q. Mr. Hansen had reported to you the survey?

A. No, he reported that to the Lost Department.

Q. I mean, someone had reported to you that there had been a survey?

A. Oh, yes, I knew the damage survey had been held.

Q. What was your purpose in looking at the barge on the dock at that time?

A. I was asked to go there and take measurements of the barge to see what her exact carrying capacity would be.

Q. Did you take these measurements?

A. I did.

Q. Are they set forth in this memorandum?

A. They are.

Q. Did you thereafter work out your own computations as to the carrying capacity of the barge based on those measurements?

A. I did.

Q. And are they set forth in the memorandum?

A. They are.

Q. To the best of your knowledge and belief are those computations correct?

A. They are.

Mr. Erskine: I offer the memorandum in evidence.

Mr. Matteson: It is not a very illuminating way to get at it.

The Court: How much is there to it; how many pages?

The Witness: Two pages.

The Court: You look it over and then I will read it. You make your objection and I will read it and pass on your objection.

Mr. Matteson: I am frank to say I cannot make head nor tail of it.

[fol. 122] Mr. Erskine: If you want me to take it step by step, I am willing to do so.

The Court: Yes, do that. Have you read that over this morning, Captain?

The Witness: No, I have not.

The Court: Take a look at it. You are going to be asked some questions about it and you had better freshen up on it.

Q. Does that refresh your recollection, Captain?

A. Yes.

Q. Tell us first how do you make the measurements, on the inside or outside?

A. The outside.

Q. Do you recall whether this barge had any substantial sheer fore and aft?

A. No, she is practically flat on deck from end to end.

Q. What did you find to be her length on deck and on the bottom, will you just state the figures there?

A. The length on the deck is 165 feet and on the bottom 136 feet.

Q. State the other measurements you made?

A. The bottom 38 feet. Those are all outside measurements. The depth from the top of the deck to underside of the bottom was 8 feet. The rakes at the ends begin at a point 23 inches below the deck, and in the later calculation I assumed that was two feet instead of 23 inches.

Q. Did you make any observations from the water markings on the outside of the barge whether there was any indication of what her light draft had been?

A. Yes.

Q. What did you find?

A. At each end there was a more or less distinctive water mark, scum, on the rakes across, and both of those showed the light draft to be about 20 inches.

Q. You spoke about the depth from the top of the deck to the bottom of the underside as 8 feet?

A. Yes.

Q. Did you measure that from the edge of the deck?

A. Yes, I measured in three places.

Q. There has been some suggestion here that there was [fol. 123] a slight camber in the deck.

A. There may have been an inch or two of camber. This is from the edge of the deck at the side to the——

Q. For those figures or measurements did you have information of the average density of molasses?

A. No, I took the molasses as having an average specific gravity, and from that calculated the weight per gallon.

Q. What figures did you use on that?

A. I will have to refer to this just a moment.

Q. What specific gravity did you use?

A. 1.34 to 1.35, and that gave me 11.2 pounds per gallon.

Q. What number of pounds per gallon did that give you?

A. 11.2.

Q. Using these measurements you had were you able to work out the tonnage carrying capacity of the barge to a certain draft?

A. Yes.

Q. Did you work it out to a freeboard of 12 inches?

A. Yes.

Q. And what did you compute would be the total tonnage carrying capacity if loaded down to a freeboard of 12 inches?

The Court: Loaded down with molasses?

Mr. Erskine: Any commodity.

A. Assuming the light draft to be 20 inches and with a freeboard of 12 inches, the displacement between the two would be 880.7 long tons. That is in fresh water.

Q. That was the tonnage irrespective of what the commodity was?

A. Yes, that was the water displacement between 20 inches and 12 inches below the deck.

Q. Then, by taking that tonnage and working it back to the number of pounds per gallon of molasses, you could work out the number of gallons of molasses in that tonnage?

A. Yes.

Q. If the testimony is that that barge normally loaded [fol. 124] a full load of molasses to a freeboard of 14 inches, I take it that that would decrease the total tonnage on board?

A. It would make a difference of about 29 tons.

Q. Did you at the time of the measurements make any survey of the barge itself, the condition of it?

A. No, I did not.

Cross-examination.

By Mr. Matteson:

Q. I notice in the written report we have here that you said your observation as to the light draft of the vessel was subject to error?

A. Yes, I took the light draft from the markings. That in itself would be an inch and a half or two inches deep. I took it from towards the bottom of that marking.

Q. Of course, if a light draft were only 8 inches you would have to add the cubical capacity of the barge, between 8 and 20 inches?

A. Yes.

The Court: Would you expect her light draft to be 8 inches?

The Witness: No, I would not.

Q. Captain, what is the difference in capacity between fresh water and salt water, what is the ratio?

A. Well, as 35 is to 36.

Q. What is that?

A. Salt water is about 35 cubic feet to the pound and fresh water 36, or 62.3 to 64 approximately pounds per cubic foot.

Q. And you have made your calculations based on fresh water, have you not?

A. Yes.

Q. And the barge would have even on your calculations a proportionately greater carrying capacity in salt water?

A. Yes.

Q. Why didn't you make your calculations in salt water, in the first place?

A. I made them in fresh water. It is very easy to change it, just multiply by 36 and divide by 35.

[fol. 125] Q. You knew that we were concerned with a barge that was in salt water, didn't you?

A. Well, it is partly salt and partly fresh.

Q. We have salt water here in the harbor, haven't we?

A. Not fully.

Q. You do not dispute that, do you, Captain, that we have salt water here?

A. We have salt water, but it is not fully salt. There is always an allowance.

Q. By using fresh water you get a lower tonnage than you get by using salt water, don't you?

A. Yes, but it was not done at all with any intention like that. You would have to take one or the other. It is just as easy to do it for salt water as for fresh water. I usually calculate barges and harbor craft and that sort of thing for fresh water because there is so much canal work.

The Court: What would this mean, it would be  $1/35$ th more?

The Witness: Approximately. I think I ran out some of these.

The Court: Well, for salt water?

The Witness: If you multiply by 36 and divide by 35 you will have it.

The Court: Yes, that means that you add  $1/35$ th, is that right—take  $1/35$ th of 880 long tons, is that what you did, and you would add that to the 880?

Mr. Erskine: What do you multiply by the 36?

The Witness: The 880 or 811. If you want to take it, say, to 80.7, multiply by 36 and divide by 35 and you will have the salt water.

Mr. Erskine: Can you tell us roughly what percentage of the 880 tons in difference that would make?

The Witness: A little over 900 or 902 or 903. I think as a matter of fact it is 905. Yes, 880.7. In my rough calculations I did do it for both.

[fol. 126] The Court: That is in fresh water?

The Witness: In fresh water, and that would be 905.8 in sea water.

The Court: It is 25 tons more?

The Witness: Yes.

Q. How much would it add to the carrying capacity if you took 6 inches off of the light draft?

A. That will take longer to calculate.

Q. All you have got to do is multiply 136 by 38 by  $\frac{1}{2}$  and that into the weight of the water displaced, isn't that it?

A. Oh, no, not quite as simple as that. You have got the rates there to consider. You will have to first find the mean water plane 3 inches below that 20-inch draft.

The Court: Well, Mr. Matteson, do you seriously contend that the light water draft of this barge was 8 inches?

Mr. Matteson: If your Honor please, that is the only testimony there is in the case. I don't know.

The Court: But you do have confidence in that testimony?

Mr. Matteson: I have not the slightest idea, if your Honor pleases. I am completely ignorant.

The Witness: I think the roughest idea of the weight of the steel and pumping equipment and that sort of thing on that barge alone altogether would upset the idea that she could possibly draw anything like 8 inches light.

The Court: I mean, if you have any figures that you find any basis for outside of what some barge captain may have said, it would be fine.

Mr. Matteson: The entire burden of proof on every phase of this case is on Mr. Erskine.

Mr. Erskine: I object to that statement.

Mr. Matteson: I only represent the cargo owner and the [fol. 127] facts of this thing are entirely outside of my ken.

The Court: I am willing that you take the time of this witness to calculate something from a certain basis if you have confidence in the basis you are starting from.

Mr. Matteson: The witness said 8 inches, this man said 20.

The Court: The barge captain said he thought it was about 8 inches.

Mr. Matteson: If your Honor pleases, all I asked this man was, suppose you take 6 inches off of it, that brings it down to 14.

The Court: Suppose you take 2 inches, the point is how much time are we going to take to calculate something that I won't give a minute's time to?

Mr. Matteson: I am perfectly willing to have him step down off the stand and make the calculation and figure out the difference that 6 inches would make.

The Court: We will have him do it right here. I have some work I have to do inside.

Mr. Erskine: Would it do any good for me to object?

The Court: No, it won't, to have him state the calculations. Now, give him all the inches you want for him to calculate the light draft.

Mr. Matteson: I only suggested 6 inches, because that is only half way down.

The Court: I will go up to chambers and do some other work and when you want me, let me know.

The Witness: Exactly what is it you want, now?

Q. The question is how much difference in the carrying capacity of the barge would it make if you took 6 inches off of your assumed light draft of 20 inches.

A. I see.

[fol. 128] Mr. Erskine: Is that going to be a matter of much time, Captain?

The Witness: No.

Q. How much difference does 6 inches in the light draft make?

A. For the immersion between 14 inches draft and 20 inches draft, that is what you want, I assume?

Q. Yes.

A. That is 77.4 tons in sea water and 75 tons in fresh water.

The Court: What did you take 14 inches instead of 8 inches?

Mr. Matteson: Yes, I just took for comparison purposes—I just asked for comparison purposes how much 6 inches would make.

The Witness: What 6 inches difference would make.

The Court: What was it that barge captain testified to was the draft light?

Mr. Matteson: I think he said 8 inches.

The Court: Yes, it drew 6 to 8 inches when light. How did you come to 14?

Mr. Matteson: Simply for comparison purposes, that is all.

The Court: So the difference between a 20-inch draft light and 14-inch draft light would result in an increase: would that be an increase?

The Witness: Yes.

The Court: Of carrying capacity?

The Witness: Yes.

The Court: 77.4 tons in salt water?

The Witness: And 75 in fresh.

Q. And you used, as I understand it, 11.2 as the number of gallons?

A. Number of pounds per gallon.

Q. Number of pounds per gallon as being the density of molasses, for the purpose of your calculation?

A. Yes.

[fol. 129] Q. And your calculations are all set forth in this memorandum?

A. Yes.

Mr. Matteson: I would like to have the memorandum marked as an exhibit.

Mr. Erskine: I have already offered it in evidence at the start, but it has not been marked yet.

The Court: In other words, you withdraw your objection to it?

Mr. Matteson: I am offering it as an exhibit for the purpose of checking this witness's calculations.

The Court: Well, you withdraw your objection to it. It was offered by the petitioner.

Mr. Matteson: Yes, I withdraw my objection.

The Court: All right, then it will be admitted as one of your exhibits.

(Marked Petitioner's Exhibit 4.)

Q. Did you by any chance compute the number of gallons per long ton of molasses—don't bother if you have not done it.

A. No.

Redirect examination.

By Mr. Erskine:

Q. When you spoke of the ratio of 35 to 36 as between salt and fresh water, would you say that the waters of New York Harbor, particularly at Pier 1, Hoboken, are salt as referred to in that ratio?

A. The only real way to tell that would be to take a hydrometer reading of the water at the time and get the exact proportion.

Q. Do you know whether or not that water has the full density of salt water?

A. No, I do not believe it has.

Q. So there would have to be some allowance for that difference?

A. There would have to be some allowance. You would have to find that allowance.

Q. In the absence of any exact measurement of the light [fol. 136] draft of that barge, would you say in your experience that it would be reasonable to take those markings as indicating the normal light draft?

A. Yes, I would say that 20 inches—as a matter of fact, I expected to find more than 20 inches. I was rather surprised when I found 20 inches.

GUSTAVE HANSEN, called as a witness on behalf of the libellant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. Mr. Hansen, are you a marine surveyor?

A. Yes.

Q. Connected with the Insurance Company of North America?

A. Yes.

Q. Will you tell us what training and experience you had as a marine surveyor?

A. I have been in the business for approximately 25 years. I have been with the Insurance Company of North America since 1937, and prior to that I was employed by the Tietjen & Lang Shipyard Company.

Q. What technical training did you have at the outset? What technical training did you have in preparation for your work, school or scientific training?

A. I started in as an apprentice boy at the shipyard and learned my trade there.

Q. You have had experience building ships?

A. Repairing ships.

Q. Did you survey the barge "T. N. 73" on drydock some time after October 24, 1937?

A. Yes.

Q. Do you remember the date?

A. November 3.

Q. In connection with that survey did you have any particular point in mind as to what you were interested in?

A. One point I was to go over to ascertain the nature and extent of the damage.

[fol. 131] Q. Anything else?

A. Also to examine the cost of the repairs.

Q. Did you personally go over the barge and examine it?

A. Yes, sir.

Q. I wish you would describe this as fully as you can, giving us the extent to which you examined the barge so as to show how much the barge came under your actual examination.

A. The barge was hauled out on drydock, and the first thing we did was to examine the barge on the dock, her end sides and bottom, and to note the damage we found. After we completed our examination of the exterior of the boat on drydock we went in her on the decks of the boat and listed all of the damage we found there. After that we went down in the cargo hold and examined the barge in each of the holds and listed all the damage found there.

Q. You mean you went into each cargo hold?

A. Yes, sir.

Q. Did you make any examination of the tanks, the peak tanks?

A. The after peak tank was about half full of water at the time and it was only possible to get part way down the peak ladder, so I just went part way down and looked around. The same applies to the bow peak.

Q. Now when you say that you examined the sides and the ends and the bottom, does that mean to indicate that you examined the entire area of those portions of the boat?

A. Yes, sir.

Q. Do you say that you made a thorough examination of every portion of that barge?

A. We did.

Q. Tell us what you found, starting with the outside, the sides and the ends. I don't mean each item which might be necessary to repair, but generally describe what damage you found.

The Court: Have you put it in the form of a survey?

[fol. 132] The Witness: Yes.

The Court: Have you seen that, Mr. Matteson?

Mr. Matteson: No, sir, I have not.

The Court: Would you like to look it over? This witness would testify to what is in the survey?

Mr. Erskine: Yes, sir.

The Court: Suppose you let Mr. Matteson look it over and perhaps he would be willing to let the survey go into evidence, and cross examine the witness in respect to it.

Mr. Matteson: This is the usual damage survey report and it lists certain items of damage which, I suppose, the witness saw and will testify were there. I have no objection to it.

Mr. Erskine: I offer it in evidence.

(Survey marked Petitioner's Exhibit 5.)

The Court: What is the date of that?

The Witness: November 3, 1937.

The Court: Now let Mr. Matteson have a copy of that.

Mr. Erskine: Have you an extra copy, Captain?

The Witness: Yes.

Q. For your own use?

A. Yes.

Q. I want you to describe now without detailing the exact plate or strake, tell us in a summary way what you found on the outside of the boat.

The Court: Summarize what is in your report.

A. On the outside of the vessel at the turn of the bilges we found the bilge plates gouged and dented and cracked, with sling marks quite evident.

[fol. 133] The Court: What do you mean by sling marks?

The Witness: Where the wire cables used by the salvage operators had cut into the plates. We found plates 3, 5 and 7, that is bilge plates, on the starboard, 5 and 7 bilge plates on the port side in that condition.

Q. Was there any doubt in your judgment at the time that those conditions you have just described were caused by the slings used in salvage?

A. There was no doubt in my mind that that was how that damage occurred.

Q. Were those plates you have mentioned—by the way, about how long were the plates?

A. Those plates average 18 to 22 feet in length.

Q. And in numbering them from which end do you start?

A. The bow.

Q. So that 3 would be the forward end of that damage you described and 7 would be the after end.

A. The after end; yes, sir.

Q. Will you tell us where those locations, 3, 5 and 7, that you just mentioned, more particularly the spot of the damage of those plates, would have been with respect to the cargo hold; were they in the area of the cargo spaces?

A. Yes, sir.

Q. So that any damage in those spots in so far as it had permitted any leakage would have permitted leakage into the cargo space?

A. Yes.

Q. Did you find anything else in the way of damage on the sides or ends on the outside?

A. Well, we found a number of rivets that were started slightly; just weeping, as we would call it.

Q. Could you tell what had caused that?

A. Some was caused, as far as we could observe, from the strain the vessel received during salvage operation.

Q. What condition did you find the deck in?

A. The deck on the port side aft or beginning at a point at about amidship and all the way to the stern was badly set down.

[fol. 134] Q. Could you from your experience form or find any explanation for that?

A. That undoubtedly occurred in salvaging operations, raising the boat.

Q. Was the deck house gone?

A. The deck house was gone.

Q. On the inside of the boat did you examine the longitudinal and thwartship bulkheads?

A. Yes, sir.

Q. What condition did you find them in?

A. The bulkheads were in good condition so far as we could observe, with the exception of a couple of brackets at the deckhead that were buckled and bent.

Q. How about the forward bulkhead which would be immediately aft the forward peak tank?

A. We found no damage to the bulkheads themselves. A few of the brackets on the after bulkhead were damaged.

Q. Did you find any evidence of the bulkheads?

A. No, sir.

Q. Did you find any condition in the boat in answer to the point which you say you were looking for, that is an explanation for the sinking?

A. No, sir.

Q. Did you find anything there to indicate that immediately previously to the sinking or at the time of the sinking there was any unseaworthiness in the hull of the barge?

A. I didn't find any.

Cross-examination.

By Mr. Matteson:

Q. I take it that when you made this examination of the barge the first that you did was to walk around the outside on the dock and observe the damaged plates?

A. Yes, sir.

Q. And then you made up your survey report regarding what you saw?

A. Yes.

Q. And then after recording what you saw on the outside, then you went up on deck and recorded what you saw on deck, is that right?

A. Yes, sir.

[fol. 135] Q. And was the deck where it was collapsed, was that over the cargo hold?

A. Yes, sir.

Q. And these sling marks that you noticed, they were in the way of the cargo hold, too?

A. Yes, sir.

Q. Where were those slack rivets that you noticed?

A. We noticed a number of them in way of the cargo tanks on the after part of the vessel.

Q. When you say a number of them, did you make any record of the number?

A. No, we agreed on a total of 500 slack rivets throughout the boat.

Q. You agreed on a total of 500 slack rivets in the boat?

A. Yes.

Q. What was the physical condition of the cargo holds when you went into them, had they been cleaned or did they still have, more or less, molasses around?

A. They were fairly clean; of course, they were quite

sticky and there was still some evidence that there had been molasses.

Q. They had not been thoroughly washed or anything like that?

A. No, sir.

Q. The residue of the molasses was such as you would find deposited on the side when the boat was pumped out after being salved?

A. Yes, sir.

Q. Apparently there had been no cleaning except to pump her out?

A. That is right.

Q. And the water had been pumped out of the cargo holds when you were in them?

A. Yes, sir.

Q. And your inspection of the cargo holds was a visual inspection, of course?

A. Yes, sir.

Q. And that goes for all of your survey, a visual inspection?

A. Yes, sir.

The Court: What did you use in the way of light?

The Witness: A flashlight.

Q. Could you tell us what there is in the way of wash plates in the cargo hold?

A. Wash plates?

[fol. 136] Q. Did you see any?

A. No, I don't know what the depth of the transverse plates was; I imagine those channels must be 8 inches.

Q. Were there wash plates above it?

A. I can not recall.

Q. If there were you would have to climb over them?

A. Yes, sir.

Q. If there were wash plates 36 inches high you would certainly notice them?

A. Yes, sir.

Q. Or even if they were 18 inches high?

A. Yes, sir.

Q. You have no recollection of that?

A. No, I have not.

Redirect examination.

By Mr. Erskine:

Q. You spoke of some of those rivets as weeping rivets.

A. Just an evidence of dampness around the rivets and consequently it is not a tight rivet.

Q. Were you able to form any judgment of how many of those total number of rivets may have reached that condition as a result of the sinking?

A. No, I could not tell that now.

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SIGURD J. LYNNER, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. Captain, are you at the present time in the business of a marine surveyor?

A. Yes.

Q. About how many years have you been doing that kind of work?

A. 21 years.

Q. Before that what was your experience?

A. Going to sea.

Q. You hold a license?

A. Yes, sir, a master's license.

Q. During the years that you have been acting as a marine surveyor what type of boats have you surveyed?

A. All kinds of boats; cargo, passenger, scow.

[fol. 137] Q. For what purposes have you made your surveys generally?

A. To determine the cause of the damage mostly and the extent.

Q. Are you familiar with estimating repairs, and so forth?

A. On barges and hulls, but not on machinery.

Q. I mean specifying the repair work.

A. On hulls, not machinery.

Q. Did you survey the "T. N. 73" on drydock shortly after October 24, 1937?

A. I surveyed it on November 3.

Q. Were you there at the same time with Mr. Hansen?

A. I was there together with Mr. Hansen.

Q. Do you remember who else was there at the time?

A. Yes, Mr. Hansen, Mr. Burg was there, and Mr. Carls-  
mann and Captain Holden of the United States P. & I.  
Agency.

Q. Now will you tell me to what extent you personally  
went over that barge.

A. I went over the barge in order to see if I could find  
any reason for the sinking of the barge.

Q. And tell me more in detail how much of the barge you  
looked at?

A. I looked at the barge all around, the sides, the ends  
and bottom of the barge from the outside. I also went on  
deck and went down in the tanks, but my survey was espe-  
cially from the outside. The boat had just become dry at  
eleven A. M. and I was there at 11:15.

Q. Summarizing it, please tell us what you found.

A. I found considerable damage all around the barge  
from the salvaging of the barge. That is, the slings had  
cut into the barge at the bilge and torn or cracked plates  
and bent up rivets and buckled the deck.

Q. Now this damage you say you found which you at-  
tributed to the salvaging slings, was there any doubt in  
your mind that that was the cause of it?

A. Absolutely none.

Q. You spoke about the deck, what did you find on the  
deck?

A. The deck was buckled.

[fol. 138] Q. What did you attribute that to?

A. To the lifting of the barge, to the strain put on her.  
I did find one slightly leaking rivet in the port after tank  
and some leaky rivets in the port forward corner of the  
fore peak.

Q. When you speak about a leaky rivet, what do you  
mean?

A. I could see there was still water in the tank and I  
could see weepage alongside of these rivets, and I went over  
and tested them, got hold of a piece of iron bar and tested  
them and found slow leakage there.

Q. How would you estimate the amount of leakage you  
saw there; what would it amount to?

A. In the one rivet you might get a bucket of water in  
four or five hours, and the others were also very slight.

Q. Other than what you have told us——

A. In regard to that one rivet I hammered it quite heavily with the bar and it became more leaky, and as there was a lot of water in the tank it started to run out a little faster, quite a little faster than when I got there.

Q. Did you find any explanation for the sinking from your examination of the boat?

A. No.

Q. Did you find any evidence that before the boat sunk she was unseaworthy?

A. No. That is what I was there looking for.

Q. And you couldn't find any explanation?

A. No.

Q. You say these conditions you say you found with respect to the rivets, they would not give any explanation for the sinking of that boat?

A. Absolutely not.

Cross-examination.

By Mr. Matteson:

Q. This leaky rivet that you spoke of was a loose rivet?

A. It was loose when I finished with it. It was not loose when I came there.

Q. When a rivet is leaky it is loose?

A. Not necessarily. You might have a leaky rivet without it being loose.

Q. If it is loose the amount of leakage depends on the position of the rivet?

A. Yes.

[fol. 139] Q. And that may change?

A. Sure.

Q. Your examination was a visual examination, the same as Mr. Hansen's was it not?

A. Yes, I didn't go with Mr. Hansen at all. I went by myself together with Captain Holden.

Q. Were you there at the same time that Mr. Hansen was there?

A. I was there at the same time but they were there for another purpose.

Q. You say you went on deck. Did you go into the cargo hold?

A. Yes, a little; I didn't go all through the cargo hold. I went down and had a look.

Q. Which hatch did you go in?

A. I went down amidships to the midships hatch. You can go into both the forward and after tanks there.

Q. And the barge was pretty sticky and dirty at the time?

A. Sure, and there was a lot of water in it, too.

The Court: Was there any water in the cargo hold?

The Witness: Yes, sir.

The Court: How much?

The Witness: Oh, about six inches; four to six inches I should say at certain places.

Q. Did you go into either of the peak tanks?

A. No, I didn't go way in; I looked into them from the top.

Redirect examination.

By Mr. Erskine:

Q. What did you see in the peak tanks? I understand you looked only from the top.

A. A little water—some water.

Q. Did you see any evidence of any molasses in them?

A. No.

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[fol. 140] ALEXANDER BOYT, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. Are you a marine surveyor?

A. I am.

Q. Connected with what concern?

A. Frank S. Martin & Sons.

Q. How long have you been engaged in that work?

A. I have been with Frank S. Martin & Sons since August, 1919.

Q. Previously to that had you had any experience as a marine surveyor, or training for it?

A. I served my apprenticeship at Harlan & Hollingsworth Corporation.

The Court: What business were they in?

The Witness: Building ships. And later I went with the New York Shipbuilding Company at Camden, New Jersey.

Q. How long were you with the New York Shipbuilding Company, approximately?

A. I think about three years, 1912 to 1915.

Q. During the time you have been employed as a marine surveyor what types of boats have you surveyed?

A. All types.

Q. Have you surveyed them to determine the extent of damage and the repairs necessary?

A. I have.

Q. Did you survey the "T. N. 73" on drydock in the early part of November, 1937?

A. Yes, sir.

Q. Do you recall being there on the same occasion with Mr. Hansen and Captain Lynner?

A. Mr. Hansen and I made the survey together. Captain Lynner was there, but he was not with us.

Q. How much of the area of the boat from one end to the other, how much of it did you yourself examine?

A. I went over the whole boat outside and inside.

[fol. 141] Q. Can you summarize for us what you found?

A. Yes, the deck plating was sagged down for a distance of about 80 feet beginning at the stern. I have my report here and I will look at it. The deckhouse was drifted from its foundation and was moved from the aft end of the vessel on to the forward end of the vessel. The side plating at the turn of the bilge was cut by slings used by the salvors in floating the vessel, and one deck plate on the starboard side, the outside strake of the deck plating was also buckled by the slings used in raising her.

Q. Where the upper part of the sling contacted the edge of the deck?

A. Yes, sir.

Q. Was there any doubt in your mind as to the cause of the damage you attributed to the slings?

A. None whatsoever.

Q. Tell us what plates you found damaged on the bilges.

A. Bilge plates 3, 5 and 7 on the starboard side were cut and dented and cracked during the salvage operations, and the adjoining plates were slightly bent. On the port side bilge plates Nos. 5 and 7 were cut and dented during the salvage operations.

Q. When you went inside what condition did you find the bulkheads in, I mean the fore and aft and longitudinal bulkheads.

A. I have no recollection of anything on the bulkheads and they must have been in good condition.

Q. Did you find any evidence of damage or leakage to them?

A. No, sir.

Q. These bilge plates that were damaged, were they in the way of the cargo spaces?

A. Yes, sir.

Q. And those bilge plates, if that damage had existed, would it have been under water while the boat was lying light?

A. Yes, sir.

Q. So any leakage there would have been right into the cargo spaces?

A. Yes, sir.

Q. Did you find any conditions to explain to you how or [fol. 142] why that boat had sunk?

A. I was not there for that purpose, but I didn't find any.

Q. Would you say there was anything which you saw in that boat which would lead you to believe she was unseaworthy before and at the time of the sinking?

A. There was nothing of that kind at all, no, sir.

Cross-examination.

By Mr. Matteson:

Q. Whom did you represent on this survey?

A. The owners.

Q. Who did Mr. Lynner represent?

The Court: Owner of what?

The Witness: The owner of the barge. I don't know who Captain Lynner represented.

The Court: Perhaps we can get it from him, is he in court?

Mr. Erskine: He is gone. I think he represented the owner also.

Q. You have a good many of these surveys in the course of a year?

A. Yes, sir.

Q. So, at this time I take it, you rely chiefly on the copy of your report to refresh your recollection rather than on present recollection?

A. Yes, sir.

Q. And your testimony in respect to the bulkhead is based on the fact that you do not find any mention of them in your report?

A. If they had been damaged they would have been in the report, yes.

Q. This barge was on drydock at the time?

A. Yes, sir.

Q. She was up on blocks?

A. Yes, sir.

Q. How high was she on blocks?

A. Probably 30 or 36 inches.

Q. You say you went on her deck, too?

A. Yes, sir..

Q. Did you go into the cargo holds?

A. Yes, sir.

[fol. 143] Q. Did you go down the middle hatch that leads to both cargo holds, do you recall?

A. I don't remember what hatch I went down.

Q. Do you remember whether you went into either of the peak tanks?

A. So far as I can get, yes, sir.

Q. I take it you could not get all the way in?

A. No.

LESTER HEAD, called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. On October 23rd and 24th, 1937, were you the mate of "T. N. 73"?

A. I was.

Q. Are you still employed by the New York Tank Barge Corporation?

A. Yes.

Q. How long had you been employed by them before the sinking of this barge?

A. I was first taken on in 1932.

Q. And you have been working on and off with them since then?

A. Yes.

Q. You acted as mate on the "73" for the carriage of other cargoes of molasses before this one?

A. Yes.

Q. Few or many?

A. Many.

Q. Do you remember Captain Dernelle leaving the boat for his vacation and Captain Tighe replacing him?

A. Yes.

The Court: Did you work on a number of barges, did you say?

The Witness: No, sir, on the one barge.

The Court: On this one all the time?

The Witness: Yes.

Q. Do you remember that replacing of the captains?

A. Yes, I do.

[fol. 144] Q. Were you on the barge during all that time under one captain, under Tighe?

A. Yes.

Q. You were on the barge right along?

A. Yes.

Q. Had you received any instructions as to how to judge a normal full load of molasses on the "T. N. 73"?

A. By the freeboard.

Q. What instructions did you have about the freeboard?

A. Two inches below the guard rail.

Q. Do you remember how deep that guard rail was on the side?

A. Approximately a foot.

Q. On your other trips had you loaded molasses to that freeboard?

A. Yes.

Q. Had you carried it safely?

A. Yes.

Q. Do you remember carrying another load of molasses before this one, I mean, the last load before this one?

A. Yes.

Q. Was that molasses?

A. Yes.

Q. So far as you know was there any trouble or damage in connection with that load?

A. No damage at all.

Q. Between that load and the time that you started to take this cargo on October 23rd, did the barge have any collision or accident or damage?

A. None whatsoever.

Q. When the boat was lying light did you look into the holds and into the peak tanks yourself?

A. Yes, I did.

Q. What was her condition as far as being tight was concerned?

A. Perfect.

Q. You recall the boat being inspected by Garpinello or his man just before this loading was started?

A. That I could not tell you.

Q. What is that?

A. That I could not tell you, because I had been to dinner at the time.

Q. Were you there, did you see Garpinello or his man there?

A. I did.

Q. Up to that time from your own observation was there any leakage in that boat?

A. No.

Q. Did you hear any complaints made by Garpinello or his man about any leakage?

A. I did not.

[fol. 145] Q. Do you remember about what time you started to pump the molasses into the barge that night?

A. Around nine o'clock.

Q. What cargo spaces did you start to fill first?

A. The two forward hatches.

Q. Was that the usual procedure?

A. Yes.

Q. Who remained on watch during the loading of the cargo hatches?

A. I did.

Q. Do you know where the captain went?

A. Yes.

Q. Where?

A. Into his cabin.

Q. At some time before the trouble started did you change the pumping from the forward to the stern compartments?

A. Yes.

Q. Did you make any actual note of the time of the hour at which you made that change?

A. No, sir, we never do.

Q. Can you give us any estimate as to what time of night she was switched from the forward end to the stern tanks?

A. I should judge around, somewhere around 11:00 or 11:30.

Q. From your experience on this barge in carrying cargoes of molasses, do you know whether there is a difference in the speed at which the ship may pump the molasses into the barge at different times?

A. Yes, sir, there is.

Q. Generally is the pumping slower at the start or as it goes along?

A. Generally slower at the start.

Q. When you say that you shut off the flow into the forward tanks and opened it into the stern tanks, how did you do that?

A. By opening the two after tanks and closing the two forward tanks.

Q. You are speaking of the valves now?

A. The valves.

Q. Did you close the forward valves tight?

A. Yes.

Q. And opened the after valves all the way?

A. Yes.

Q. How did you determine or what was it that made you decide to shut off the forward tanks and start the stern tanks?

A. We usually load it down as far as the beginning of the bow fender and switch over to the after tanks.

[fol. 146] Q. How did that compare with the usual practice in loading the barges, is that the way you usually do it?

A. That was the usual way.

Q. Did you look inside through the hatches into the forward tanks before you shut them off?

A. Yes, I looked in the after end of the forward tanks.

Q. Did you see how far the molasses was up on the bulkhead under the hatches there?

A. I should judge between two and three steps.

Q. Of what?

A. Of the ladder.

The Court: Between the second and third steps from the bottom or the top?

The Witness: From the bottom.

Q. Where were those steps, on the bulkhead?

A. Yes.

Q. The cross bulkhead?

A. Yes.

Q. And when you made that change did you have in mind how far you would go in the stern compartment, that is, what would indicate to you how far you would go in the stern compartments?

A. I would complete the stern tanks down to two inches below the guard rail.

Q. You mean 14 inches below the deck?

A. 14 inches all told.

Q. Then what would you do?

A. Swing back to my forward tanks and finish her off.

Q. Had that been your regular practice on that boat?

A. It had.

(Recess until 2:00 o'clock P. M.)

2:00 P. M.

[fol. 147]

(After Recess)

LESTER HEAD resumed the stand.

Direct examination.

By Mr. Erskine (continued):

Q. When you were alongside and commenced loading the barge do you remember what lines you had out to the ship?

A. Yes, sir; there were two breast lines and two spring lines.

Q. Where did they run from?

A. One from the quarter deck forward up to the ship and another line forward running from the center cleat up the ship.

Q. Go ahead.

A. Aft a line ran from the quarter deck up to the ship and a line from the starboard corner up to the ship.

Q. At the stern the lines ran from the two opposite corners of the barge?

A. That is right.

Q. Do you remember what the condition of those lines was?

A. Yes.

Q. What was it?

A. Three of them was brand new and one line was a few days old.

Q. Now when you shut off the forward tanks and started to load molasses in the stern tanks did you do anything to the stern line?

A. I slacked up after I put some molasses into the tanks.

Q. What was the purpose of that?

A. The ship was going up and the barge was going down.

Q. Did you know that it was necessary to allow slack so as to allow that difference?

A. Yes, sir.

Q. After you slacked the lines at the time you mentioned, did you slack them again before the accident?

A. I did.

Q. When?

A. Approximately a half hour after I started.

[fol. 148] The Court: Started where?

The Witness: On the after tanks.

Q. From then on did you slack them again?

A. I slacked, as I recall it, I slacked them two or three times during the evening. When just about I could not tell you.

Q. How long before the accident was the last time you say you slacked the line?

A. I guess it would be almost when the tanks were finished.

Q. You have talked with me about this case before?

A. I have.

Q. Didn't you tell me you slacked the lines only once?

A. No, sir, I did not that I can remember.

Q. After you commenced loading into the after tanks where were you?

A. I was up on the forward end of the barge and then from the forward end of the barge I walked down to the cabin.

Q. What cabin?

A. On the barge.

Q. Did you have quarters in there?

A. Yes, sir, I had.

Q. Why did you go in the cabin?

A. To change clothes.

Q. What time was it you went into the cabin?

A. It was right before the barge went down.

Q. Go ahead now and tell us in your own way what was the first you knew of anything wrong.

A. I had walked up forward—

The Court: After having been in the cabin to change your clothes?

The Witness: No, before that; and I had been talking to the third officer and the customs sampler up on the deck.

Q. They were on the deck of the ship?

A. Yes, sir.

Q. Go ahead; what did you do next?

A. I stayed there for a while and was talking with them, and I walked down to the stern of the boat again, and I [fol. 149] walked into the cabin and I took off a leather jacket I had put on, and during that time I fixed the fire and came out again. Then I walked to the bow of the boat.

The Court: You took off a leather jacket?

The Witness: Yes, sir. I walked to the bow of the boat, and I looked around, and I went back to the stern again. The after tanks I thought were completed, and I looked around over the edge of the boat and she seemed to suit me, and I walked forward again with the intention of opening up the forward tanks. I got up there again and I talked to the mate and the customs sampler again, and they left, and I turned to the valves again. Then I opened the valves, I turned around and the stern of the boat seemed to settle suddenly. I started down again and she took the second drop—it would be the first drop, because the first time was just she seemed to heave off a bit. By the time I got down there the whole stern had gone under.

The Court: Down where?

The Witness: Down to the stern of the boat. And the first thing I thought of was calling the captain. I went to the cabin door and he had been on his way out at the time. We started back up towards the bow of the boat and he happened to ask me what valves I had opened. So he had the idea of shutting off the after tanks which I had not done. Before we could do that, that was when she took the second sudden drop. He says, "Come on, you better get off." So we went up the side of the ship and on to the ship.

The Court: It took another drop during that time?

The Witness: That was when the captain had come out and joined me.

[fol. 150] Q. Now, in telling us that story of what you did, have you told us what you did from the time you opened the valves into the stern tanks?

A. No, sir, I have not.

Q. When did that start, what time was it that you began these things that you told us about, walking up the forward deck, and so forth?

A. That was right before that. I thought it would be a short while later the tanks would be completed.

The Court: Were the rear tanks being filled at that time?

The Witness: Yes, sir.

Q. You went into the cabin to change your coat. Did you keep any watch on the clock as to how long you were in there?

A. No, sir, I did not take notice. I just had a strap watch, but I would not even say it was five minutes.

Q. That ten to five minutes is simply your estimate, is that it?

A. That is all.

Q. As I understood your story, after you came out of the cabin, it looked to you that the stern tanks were about ready to shut off?

A. That is right.

Q. And you judged that by looking over the side?

A. Yes.

Q. And how much of the stern do you think was down in the water then?

A. Well, the way she looked to me by flashlight she was about three inches below the guard rail on the side.

Q. You figured that the after tanks were then about ready to shut off?

A. I do.

Q. Then, as I understand it, you walked forward and had some conversation with the men on the ship?

A. That is right.

Q. And then you started to the valves to shut off?

A. To open up the forward tanks.

Q. Had you actually turned any valves before this drop occurred at the stern?

A. I had.

[fol. 151] Q. Which ones?

A. If I remember right it was the port valve forward.

Q. But you had not shut off the stern valves?

A. I had not.

Q. Then you felt this drop?

A. Yes.

Q. Did you start aft as soon as you felt the first drop?

A. I hesitated for a second, not knowing what it was.

Q. Then did you go aft?

A. Yes.

Q. And the stern valves were still open?

A. The stern valves were still open.

Q. By the time you got back there had been another drop and the stern was under water?

A. Yes.

Cross-examination.

By Mr. Matteson:

Q. What is your age, Mr. Head?

A. Twenty-three.

Q. How long have you been working for the New York Tank Barge Company?

A. I started on and off working part time in 1932.

Q. Well now, had you been working that way part time until the time of this accident?

A. No, sir, I was a steady man.

Q. How long had you been a steady man?

A. If I am not mistaken this will be three and a half years.

The Court: From today or up to the time of the accident?

The Witness: Well, it would have been two years approximately at that time.

Q. You had never been in charge of a barge, had you?

A. Yes, sir, I had.

Q. Had you had any other experience with boats, except what you had on the boats of the New York Tank Barge Company?

A. No, sir.

Q. Had you had charge of loading the boats previously to this occasion as you did on this occasion?

A. Yes.

[fol. 152] Q. How many times do you think that you have had charge of trimming a boat and manipulating the valves before?

A. That I could not answer, but it was quite a few times.

Q. Had you received instructions from the captain, this captain, and other captains, with whom you had worked, as to how to do it?

A. Yes.

Q. So that you considered that you understood it thoroughly?

A. I do.

Q. On this occasion you loaded the forward tanks first?

A. Partly.

Q. You loaded them until the bow fender was even with the water?

A. Flush with the water.

Q. And then you shut off the valves on the forward tanks and opened the valves on the after tanks?

A. Opened the after first.

Q. And then closed the valves on the forward tanks?

A. That is right.

Q. Then your purpose, I take it, was to load the after tanks until she came on even keel again?

A. The after tanks would be loaded to capacity.

Q. And then you would switch back to the forward tanks?

A. And trim her.

Q. That is the way it is usually done?

A. That is the way I have been taught and everybody else is.

Q. That is the proper way to do it?

A. Yes.

Q. So you loaded the after tanks until you had a free-board of three inches below the guard, is that right?

A. That is right.

Q. And your instructions are when she is fully loaded that she is to be two inches below the guard, is that right?

A. Yes.

Q. So that you had at least an inch to go at the stern?

A. That is right.

Q. And when you evened up on the forward tanks that would bring the stern up somewhat, would it not?

A. Yes, it would.

[fol. 153] Q. So that what you did was the proper and usual thing to do, is that right?

A. Well, now, when I said three inches—I gave myself time when I reached the forward end of that boat to figure that another inch would lower the guard rail an inch.

Q. In other words, you allowed yourself plenty of time to get forward to operate the valve?

A. I would not say plenty of time.

Q. Well, enough?

A. But I figured enough time.

Q. When you made these observations I understood that was after you had been in the cabin, is that right?

A. That is right.

Q. So that after you came out of the cabin I think you said you went forward on the barge?

A. Yes.

Q. And you then came back and made this observation?

A. I came out of the cabin and walked to the forward end of the barge. Then I walked aft again and made the observation and went forward again.

Q. And when you went forward again you went forward to the location of the valves?

A. Yes.

The Court: When was it you had the conversation with the third mate, or the third officer?

The Witness: I had talked with him two different times within that period.

The Court: I mean, after you came out of the cabin?

The Witness: That was when I walked forward and I checked around up forward and I walked aft and I looked around down there, and I thought she would be about completed and I walked forward, and that is when I spoke to the third officer the second time.

The Court: Before you went to the valves?

The Witness: Yes.

Q. You did not have to go on the ship to speak to the mate, did you?

A. No.

[fol. 154] Q. It was just calling back and forth from the deck of the barge to the deck of the ship?

A. Yes.

Q. Well, you considered that everything was going all right, didn't you?

A. I did.

Q. You did not consider that the barge was overloaded by her stern or anything of that kind when you went to the valves to operate them, did you?

A. As far as the slack in the lines was concerned, that is

possible, because I have no idea of when I did look at the lines exactly.

Q. I was not talking about the lines; I was talking about the trim of your boat?

A. Well, as I told you before in my estimation it looked all right.

Q. It looked all right. And when you made your observation as to the freeboard of three inches or so below the guard at the stern, how was the bow end at that time?

A. She was listing aft.

Q. Listing somewhat aft?

A. Yes.

Q. How was the freeboard at the bow at that time, do you know?

A. I judge she must have been a couple of inches below the bow fender.

The Court: Well, did you look?

The Witness: No, I did not.

Q. Well, two inches below the bow fender, you said?

A. The fender, yes.

Q. And the fender projects about a foot lower than the guard, doesn't it?

A. Maybe a little bit more.

Q. Well, there is nothing out of the way about that trim for the ship, is there?

A. Not that I could see.

Q. It makes a difference of about a foot between one end of the boat and the other, is that right?

A. It is according to the actual length of the guard fender, I should think.

Q. And the guard fender just covers the upright end of the boat down as far as where the rake begins, doesn't it? [fol. 155] A. If I am not mistaken she extends a bit further down than that.

Q. Well, below the rake there is nothing to fasten it to, is there?

A. Still and all you have got usually that much space where she is.

The Court: How much do you mean?

The Witness: Why, almost a foot where she is fastened into the hull of the boat.

Q. The bow fender consists of planks that are right fast to the flat side of the boat, doesn't it?

A. Yes.

Q. When you went to call the captain you say there was water on the after deck?

A. There was.

Q. And when you called the captain did he come right out?

A. Yes, but the water had been up at that time already.

Q. Yes, I know, but when you and the captain came out of the cabin——

The Court: The witness was not in the cabin, he was just to the door. He says he just went to the door.

Q. Yes, just to the door. Did you wait there until the captain came out?

A. Yes, I did.

Q. When the captain came out how much water was there on the stern?

A. It was up to my waist and it would be a little higher on him on account of his size.

Q. You opened the valve into the forward compartments before you went to call the captain, is that right?

A. I opened the port tank forward. That I remember. The others I could not.

Q. You do not remember whether you opened the other one or not?

A. No, sir.

Q. And as soon as you did that, why, she would be fill [fol. 156] ing forward as well as aft, wouldn't she?

A. I think the pressure would bring it down aft on account of the list of the boat.

Q. I mean, as soon as you opened the valve then you have got one of your lines connected with your manifold open and connected with the forward tank, and molasses blowing through it, haven't you?

A. Yes.

Q. It was about that time that the barge settled first, you say?

A. That was when I was opening the forward tank.

Q. Now, just prior to the time that you opened this valve the barge had had a freeboard of three inches below the guard at her after end, hadn't it?

A. That is right.

Q. Now, when she settled this first time how much did she settle?

A. That I could not tell you because I did not go and look right away.

Q. Well, it did not bring her stern under water, did it?

A. I could not see in the darkness.

Q. It was dark?

A. It was.

Q. Was this first slump a pretty good slump?

A. It felt like it.

Q. But you could not tell whether the stern went under water at that time or not?

A. No, I could not.

Q. This second slump that you speak of took place when you and the captain were at the valves again?

A. No, sir, the first time that I felt the boat settle was when I was at the valve, but it was while I had hesitated for that second she took that sudden drop. It was then that the water came over the stern, and that is when I went to the captain.

Q. All this took place very quickly, I take it?

A. It did.

Q. How far is it from where the valves are located to the cabin door?

A. Almost three-quarters of the boat, or length of the boat.

Q. The valves are located on the deck amidships?

A. No, sir, that is for the after tanks.

[fol. 157] Q. So in order to open the tanks forward you have to go to the forward end?

A. That is right.

Q. And it was while you were at the forward valves that she took the slump that resulted in your going to call the captain?

A. Yes, sir.

Q. Did I understand you to say that after the captain came on deck and you went to the valves and the captain suggested closing them, that then she took another slump at that time?

A. Yes.

Q. So there were two slumps, is that right?

A. Yes.

Q. The first one was when you went at the valve at the forward end, the valves to the forward tanks?

A. That is right.

Q. And the second one was after you called the captain and he came out with you and went to the valves midships?

A. He had not quite got to the valves when she had taken that.

Q. Second slump, you were just approaching the valves?

A. Yes.

By the Court:

Q. Just a minute. I understood your testimony on direct examination to be that the stern seemed to go down a little while you were at the first valve?

A. Yes, sir.

Q. And while you were still at the valve it took a slump?

A. Yes, sir.

Q. After you had gone down and met the captain coming out the door and while you were on the way back midships it took another slump?

A. Yes, sir.

Q. That would make three altogether.

A. I was asked about that. I didn't say it was a slump. It was, more or less, like a heavy jar, just as if a line was breaking off the cleat and caused it to settle.

Q. But you did feel that heavy jar, and you also felt the first slump before you went down.

A. Yes, sir.

[fol. 158] Q. I thought you said there were two things you noticed while you were still at the first tank.

A. I started to make that clear before.

The Court: Perhaps I didn't get you right.

By Mr. Matteson:

Q. Well now, see if we have it right now. You noticed the freeboard which was all right, so then you went when you thought the time had come to load in the forward tank.

A. Right.

Q. So you started forward to the valves at the forward tank on the forward end?

A. Yes, sir.

Q. And was it before or at the time you got there that you felt the first slump?

A. It was after I had gotten there.

Q. Then you opened the valves, is that it?

A. That is it.

Q. And then did she slump some more before you went to call the captain?

A. That is when she took the heavy drop; that is when the stern went under the water.

Q. That is when you were opening the forward valve?

A. Yes, sir.

Q. There was just one slump at that time?

A. It was when I started towards the cabin that the heavy slump came.

Q. Just before that you had been at the stern observing the draft?

A. Yes, sir.

Q. Were the lines all right at that time?

A. To tell the truth, I didn't take notice of them at that time.

Q. You were on deck and in charge of the lines?

A. I was.

Q. And you went to the after end of the boat and you observed her draft, and that took you right where the lines were, didn't it?

A. It did.

Q. And you haven't any doubt in your mind but what those lines were all right at that time, have you?

A. That I could not say.

[fol. 159] Q. Well, are you attempting to convey the impression to us that you were negligent in observing those lines at that time?

A. I wouldn't say negligent, because as I said before, the stern end of the barge was up and the bow was low. If it was negligence, I admit it, I did not look at the lines.

Q. Have you been told by your counsel or anyone else that if this accident could be attributed to your negligence that it would be a defense to this case?

A. No, sir, nothing like that was said to me. I was told to tell the story as it was.

Q. All you can tell us now is that you don't recall looking at those lines at that time?

A. Yes, sir.

Q. You wouldn't say you did not look at them?

A. I did say I did not.

Q. How do you recall whether you did or did not?

A. I am trying to be truthful about it.

Q. It would be the natural thing for you to do to look at the lines?

A. Yes, if I thought of it, but I went to the side of the barge, and if a line was tight I would slacken it off; if I took notice of it then I would have done it then.

Q. You were the only man on deck at that time?

A. I was.

Q. And you were responsible for those lines?

A. I was.

Q. And if anything went wrong with those lines you knew it would be charged to you, that is right, isn't it?

A. I suppose so.

Q. And yet you want us to believe now that you went back to exactly where those lines were located and you recall definitely that you did not look at them.

A. Yes, because one line was running from this corner and one was down on the corner bitt. When I looked at the freeboard I looked over the center of the barge and aft and went by the sides by walking past the cabin.

Q. You did adjust these lines several times, didn't you?

A. To my recollection I did.

[fol. 160] Q. And the last you saw of them they were all right?

A. They seemed all right to me.

Q. And the first slump that occurred was during the period of time that it took you to walk from the stern where you had served the draft to the pump on the forward end of the barge, is that right?

A. The pump is midships.

Q. To the valve on the forward end.

A. To the valve. It was in that time I stopped and talked.

Q. What did you say?

The Court: Is that what he said?

Mr. Matteson: I am not sure, if your Honor pleases.

The Court: When you cross examine a witness, be fair, and if that is not what he said it is not proper cross examination to put those words in his mouth.

Mr. Matteson: I certainly want to be fair and I will try to be.

Q. This conversation that you spoke of with the man on the deck—

The Court: There were two conversations he had on the deck.

Mr. Matteson: I will refer to this one specially.

The Court: Which one do you mean, the last one before the accident?

Mr. Matteson: No, sir, the one that occurred while he was walking from the aft end of the barge to the forward end of the barge.

Mr. Erskine: He didn't testify to that.

The Court: I didn't hear that. Suppose we have the stenographer read several questions back.

(Questions and answers read.)

The Court: I do not understand the witness to have testified that the first slump he felt while walking from the stern of the boat up towards the valves.

Mr. Matteson: I understood him to say that he had taken this observation and gone forward to the valve and it was just before he got to the valve that the conversation took place.

The Court: Let the witness tell us what happened. Start from where you looked over the side of the barge to observe the freeboard, is that right?

The Witness: Yes, sir.

By the Court:

Q. Now, from there on tell us what you did and what happened.

A. After thinking that the barge had had enough in the stern tank I allowed myself that one inch between the two inches freeboard called for.

Q. And the three you observed?

A. Yes, sir.

Q. What did you do then?

A. I walked up the deck of the boat and I spoke to the customs sampler and the third mate again. Then they left the rail of the ship and I turned to the valves.

Q. Had you felt any jar up to that time?

A. Not up to that time.

Q. Or any slump?

A. No, sir.

Q. So you turned to the valves?

A. Yes, sir.

Q. Tell us what happened next?

A. As I turned to the valves that is when I felt the first jar.

Mr. Matteson: That is the way I understood it.

The Court: That is the way I understood it at the start out I didn't think that was the way your question was. At any rate, we have it now.

By Mr. Matteson:

Q. The only thing that happened during that time when you were walking from the stern up to the valve was this [fol. 162] exchange of words with the mate and sampler on the deck of the ship as you went up, is that right?

A. Yes, sir.

Q. What did that conversation consist of, what did you say and what did they say?

A. I cannot recall exactly but it was concerning a job that was coming up for Peekskill and the sampler said he would like to get that job.

Q. Did they ask you when you would be finished loading?

A. No, sir, not at all.

Q. You know how long that conversation took. Do you know how much time you allowed yourself after observing the draft at the stern; did you still allow yourself to get to the forward valve including conversation and everything that took place?

A. I didn't figure any definite time; I just thought when she had enough I would open the forward and shut off the after valve.

Q. There was no hurry about it?

A. No, not exactly a hurry; it wouldn't take ten minutes with opening the valve and everything else.

Q. That was the time you allowed yourself?

A. I didn't allow myself that time. I just figured I would walk to the bow of the boat and open them when I got there, but I just happened to stop and have these couple of minutes and then I went on to the valves.

Q. When you got to the valves did you think you were in plenty of time?

A. Yes, sir, I did.

Q. You didn't have any doubt about that in your mind?

A. No, I told you before I did not.

Redirect examination.

By Mr. Erskine:

Q. This morning you told me that when you shut off the bow tank you thought your bow end was down so that the bow fender was about to the water at the bottom end.

A. Yes, sir.

Q. And about two to three rungs of the ladder were covered by the center bulkhead in the forward tank?

A. Yes, sir.

[fol. 163] Q. Can you give me any estimate from your experience on the "73" how much that molasses that was in the forward tank then represented of what the normal full load in these tanks would be after you finished?

A. I would—about half the capacity.

The Court: In that forward tank, half the capacity loaded in the forward tank?

The Witness: Yes, sir.

Recross-examination.

By Mr. Matteson:

Q. What time did you figure the barge would have her full load?

A. Well, by the way she was going I should judge it would take at least an hour and a half to complete the trimming of her.

Q. From the time that the accident happened you mean?

A. Yes, sir, I should judge it would take that long.

Q. Didn't you tell the mate on the ship or the ganger that you would be finished loading about one-thirty?

A. I did not.

ROBERT S. HAIGHT, called as a witness on behalf of the petitioner, being duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. Mr. Haight, what is your occupation?

A. Marine surveyor.

Q. What has been your training and experience in that work?

A. I graduated with the degree of Mechanical Engineer from Stevens Institute in 1899; thereafter I worked for two years in the shipyards—

Mr. Matteson: I will concede Mr. Haight's qualifications.

[fol. 164] A. (Continuing:) —for four years after that I was assistant to the superintending engineer of a steamship line, and four years I went to sea as an engineer, and after that I established myself in my present business in New York and have continued ever since.

Q. Have you designed vessels yourself?

A. I designed tank barges and some yachts.

Q. You did not see this "T. N. 73" in connection with this disaster, did you?

A. No, sir, I never have seen her.

Q. I show you Exhibit 4, which is the memorandum prepared by Captain Jeffcott containing his measurements and computations, and so forth. Have you examined that document?

A. Yes.

Q. You have noticed in there that the captain put down certain measurements of the barge and from that computed the tonnage displacement of the barge or her carrying capacity.

A. Yes, he computed her dead weight.

Q. Have you checked his computations of the dead weight?

A. Yes.

Q. Are you able to say from your knowledge and experience that his computations are right or wrong?

A. Right.

Q. I also show you these four photostat sheets marked Exhibit 1 for Identification. Have you examined those?

A. I have examined them casually, yes.

Q. From your examination were you able to arrive at the proportionate capacity of the forward tanks as against the after tanks?

A. Yes.

Q. What was the proportionate relation?

A. As to length the forward tanks are 7 and the after tanks 5. In other words, the proportion was 7 to 5.

Q. The other dimensions of the tanks were the same.

A. The same, yes.

Q. There is testimony in the case that this barge commenced loading a cargo of molasses alongside of the steamship, being moored with two lines forward, one from the inner corner and one from the middle forward bitt, two [fol. 165] lines aft, one from each of the stern corners to the ship. The loading commenced into the forward tanks; that loading continued until the forward fender was about down to the water line; that from two to three rungs of the ladder on the bulkhead in the after end of the forward tank were covered with molasses, those rungs being about a foot apart. It is also estimated that in that condition the forward tank had taken aboard about one-half of the molasses which would go into those forward tanks with a normal load. It is also testified here that the normal load would have been gauged by loading to a freeboard of about 14 inches or 2 inches below the one foot guard rail on the side. Have you those facts in mind which I have stated?

A. Yes, I think so.

Q. Now, it is claimed in the pleadings in the case by the Molasses Company, the claimant, that at the time of the sinking there had been pumped into the holds of the barge 165,042 gallons of molasses; I put the question to you whether on the measurements obtained by Captain Jeffcott, the computations of dead weight and your information of the relative sizes of the tanks, that if the loading of the forward tanks was stopped in the condition I have described and from then on the cargo was pumped into the stern tanks, are you able to say what the condition of the trim of that barge would have been by the time 165,042 gallons had been pumped into her?

A. Yes.

Q. What would it have been?

A. Her stern would have been under water.

Mr. Erskine: Are you willing to make any stipulations about the strength of that line?

Mr. Matteson: You asked me about the tensile strength of a 5-inch line. I see by Captain Knight's Seamanship that the tensile strength is supposed to be about 22,000 pounds.

[fol. 166] Mr. Erskine: Mr. Matteson is willing to stipulate that the tensile strength of 5-inch lines is about 22,000 pounds.

Q. Mr. Haight, assuming that those two stern lines were 5-inch lines of a tensile strength of about 22,000 pounds, are you able to compute to what extent those stern lines might have held the stern under an excess load of cargo in the after tanks; in other words, would those lines have had any effect in keeping her stern from going down?

A. They would to the extent of their own strength, which would be 20 tons.

Q. If those stern lines were holding the stern, as I understand it they might hold it to a strain of 20 tons?

A. Not exactly, because the lines led to the corner of the barge away from the ship. They would not be brought into full play until the boat had sunk a considerable distance. The up and down line would probably be able to hold out pretty much to its ultimate strength.

Q. If those lines were holding any substantial strain, the effect would be to keep the stern from going down?

A. Yes.

Q. Then if those lines slipped or gave way, what would be the result?

A. If the disposition of the cargo was such as to make the stern deck sink under water, it would sink when the lines let go.

Q. As the stern went down what would happen to the cargo that had already been put into the forward tanks, of molasses?

A. It would seek its own level and the center of gravity would cause it to move aft.

Q. That would accelerate the sinking in the stern?

A. It would aggravate it.

Cross-examination.

By Mr. Matteson:

Q. Have you figured out, Mr. Haight, what the capacity, or put it this way—supposing this barge were loaded with [fol. 167] cargo into her forward tanks only to such an extent that her bow was brought down to the lower part of the fender which covers the upright part of the barge down to where the rakes begin, have you figured out how much cargo there would be in the forward holds to bring that result about?

The Court: Before putting any cargo in the aft?

Mr. Matteson: Before putting any cargo into the aft hold, yes.

A. I have figured the quantity what would bring her bow down so that she had one foot of freeboard at the bow end. I have not figured it to the point that you name.

Q. What have you figured?

A. 375 tons would leave her showing one foot of freeboard at the bow end, according to my figures.

Q. With nothing in the after tanks?

A. No, sir, nothing in the aft tanks.

Q. How much difference in the freeboard of the barge at her stern, assuming that she is loaded to a point 3 inches below the guard, how much difference—

A. At the bow end?

Q. At the stern end. I am assuming that the tanks had been leveled off to a certain extent—well, I will put it this way: that the stern is down so that her freeboard is three inches below the guard rail, as they call it, and she is also loaded forward so that at the same time the bow of the barge has a freeboard extending to the bottom of the forward guard; do you understand the picture?

A. I understand what you mean.

Q. Now, how much difference under those circumstances in freeboard at the stern would 20 tons make? It would be very trifling, wouldn't it?

A. I would not attempt to answer off hand, because I have not figured the barge in the exact condition in which you named it.

Q. It would not be more than an inch or so, would it?

A. I think it would.

[fol. 168] Q. Well, how much would you say would be an outside limit, 20 tons?

A. That is, an upward pull of 20 tons on the stern?

Q. Yes, 20 tons, yes.

The Court: What do you mean by an upward pull?

Mr. Matteson: A downward pull—

The Court: 20 tons additional in the stern tanks?

Mr. Matteson: 20 tons additional in the stern tanks, how much more would that put her down?

The Court: Where would the measurement of the point at which the stern is to be taken, would it be taken right over the center of the stern or would it be taken on the side, or where in your question? I mean, I do not understand it and I would like to know.

Mr. Matteson: Anywhere on her stern.

The Court: The guard rail does not run around to the stern, does it?

Mr. Matteson: It runs to her stern on the side, as I understand it.

The Court: So that the measurement is right at the corner then of the stern?

Mr. Matteson: Yes, that is right.

The Witness: As I understand your question, Mr. Matteson, it does not make any difference whether it is the corner or not. You want to know what her change of trim would be for 20 tons?

Q. That is it exactly.

A. Roughly her stern would go down about 5 inches and her bow would come up about 5 inches.

Q. If you double that weight it would have approximately double the extent to which she submerged?

A. Roughly, yes.

[fol. 159] Redirect examination.

By Mr. Erskine:

Q. In answer to Mr. Matteson you said you had worked out that figure on an assumed freeboard of a foot at the bow end?

A. Yes.

Q. Starting with that computation of the quantity of molasses which would then be in the forward holds, did you work out how much molasses would have to go in the stern compartments to bring the stern deck at the stern end down even with the water?

A. Yes.

Q. How much would that amount to?

A. There would have to be 420 tons roughly in the after tanks to do that.

Q. Then subtracting from the total tonnage of the 165,042 gallons—

The Court: That is to say the total tonnage in the after tanks.

Mr. Erskine: To bring the stern end down even with the water line.

The Court: Assuming that she had the number of tons that he figured in the forward tanks,—what did you say they were?

The Witness: 375, sir.

The Court: How many additional?

The Witness: 420.

Q. What did you compute the total tonnage of the 165,042 gallons of molasses?

A. 855 tons.

Q. Then what balance if any would have been left beyond the point at which the stern end was level with the water?

A. 60 tons not yet on board.

Q. That is all on the assumption that the loading of the bow compartments had put the bow end down to a freeboard of a foot?

A. Yes.

Q. If in fact that loading had only continued until the bow was down to a freeboard of 23 inches approximately, [fol. 170] that would mean that the quantity in the forward tanks would be less than the figure you have indicated or worked out?

A. Yes.

Q. And that would leave a greater amount to be accounted for in the stern compartments?

A. Yes.

Recross-examination.

By Mr. Matteson:

Q. In computing the relative weights and capacities that you referred to in the forward and after tanks, have you used the ratio of 7 to 5?

A. In tank's length, yes, sir.

Q. Now, the dimensions which have been given us are 72 feet for the length of the forward tanks and 58 feet for the length of the after tanks.

Mr. Erskine: Those were not exact measurements.

Mr. Matteson: They are the measurements you gave us, the only ones we have got to work on.

The Court: We have had some witness here that testified about it. Let us see, one of the surveyors I think it was.

Mr. Erskine: I do not recall any testimony of any actual measurements, your Honor.

The Court: The witness Jeffcott testified that the length on deck was 165 feet, on the bottom 136 feet, and the beam

was 38 feet. Now, let us see if he said anything about the tanks.

Mr. Matteson: I have it right here in the minutes.

The Court: Who was it?

Mr. Matteson: This is the testimony of Mr. Baldwin, the president of the company, page 31.

The Court: Yes, he said 72 by 8 by 18, the two fore tanks which were that, and the two after tanks 58 by 8 by 18, and then he later said he is not sure whether it was 18 or 19.

Mr. Matteson: That is the width and that refers to both forward and after tanks.

[fol. 171] The Court: I assume so.

Mr. Erskine: He also said that those figures were approximate.

Mr. Matteson: It is the only testimony we have got in the case.

Mr. Erskine: The question was will you give us approximately.

Mr. Matteson: Right.

The Court: Well, all right, now, taking those figures frame your question.

Q. Now, if we take the lengths as being 72 and 58, the ratio is much nearer 65 than 75, isn't it?

A. It would be less than 7 to 5, certainly.

Q. It would be very close to 65, wouldn't it?

A. If you will give me those lengths again.

Q. 72 and 58.

A. The way I worked it out is that 12 goes into 72 six times, and five times 12 would be 60, which is only 2 feet more than the after tank. So it is very close to 65.

The Court: There was no part of the rake in any of the tanks?

Mr. Matteson: No.

The Court: Your tank lengths do not check up with the length of the barge on the bottom.

Q. That is quite possible too, isn't it, Mr. Haight?

A. It would be unusual.

The Court: What do you mean by that?

The Witness: I mean that in this type of barge the peak bulkheads usually run down to the knuckle at the bottom.

The Court: The knuckle is where?

The Witness: Where the rake starts.

[fol. 172] The Court: And the cargo tanks started where the rake stopped, is that your idea?

The Witness: Yes.

Q. You do not as a matter of fact, know anything about this barge, do you?

A. Not this particular barge, no, sir.

The Court: Is there somebody who can remove the doubt as to that for us? How about it, Mr. Erskine? Have you any information on that point—well, you have assumed this, Mr. Witness, in your figures, that the tanks, the cargo tanks covered all of the bottom of the barge, is that it?

The Witness: Yes, and the forward tank was 79 feet long and the after tank 57 feet long.

The Court: That is the way you have worked it out?

The Witness: Yes.

The Court: 79 as to 57?

The Witness: Yes.

The Court: Well, of course, if you had 72 as to 58, if the one gave you a 7 to 5 ratio, the other would give you less?

The Witness: Give you less, yes.

Redirect examination.

By Mr. Erskine:

Q. Now, coming back to the last question that Mr. Matteson put to you, if you did not know the forward tanks that would again decrease the quantity of molasses in the forward tanks when she was down to the point described, would it not?

A. I think the quantity would remain about the same as to tons.

Q. It would not increase?

A. We are only speaking about trim. There would be a minor difference, but the weight would be approximately the same.

[fol. 173] Q. If the forward tanks were reduced and the after tanks increased, then the quantity in the forward tanks would be less, would it not, than the figures you worked out?

A. No, because I am dealing in tons. I have got to have that many tons in there to get the boat down. It does not

make any difference whether it goes in a 79 foot tank or 72 foot tank.

The Court: I see, you take the displacement of the boat?

The Witness: Yes.

Re-cross examination.

By Mr. Matteson:

Q. And you also take the division between the tanks as being the division indicated by the figures that you used?

A. That is right.

Q. And if we take different figures, why that moves the place of the division between the tanks?

A. It would change all my computations somewhat.

Redirect examination.

By Mr. Erskine:

Q. In what way would it change them?

A. I would not attempt to say without going through it again. It is not a simple computation.

Q. I understood from your first testimony that you testified that your 7 to 5 relationship was justified by your examination of the calibration records in Exhibit 1 for identification?

A. I thought it was, yes.

Q. You still think so?

A. I still think so, but I have not gone into that very minutely.

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[fol. 174] EDWARD C. HOLDEN, JR., called as a witness on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Erskine:

Q. What is your occupation?

A. Manager of Safety Department of the United States Protection and Indemnity Company, New York City.

Q. How long have you been in that work?

A. Eight years.

Q. And describe in a general way what your duties are in that position?

A. I am in charge of the safety department which inspects the vessels of our assureds for the determination of safe working conditions, accidents, prevention work and seaworthiness.

Q. Does your inspection cover all of the boats that are insured by your company; do you inspect all of the boats that are insured by your department?

A. We try to.

Q. With respect to barges and that type of vessel, how often on the average do you inspect them?

A. We make monthly inspections of the barges.

Q. You mean by that an average or that you have a regular date to inspect each barge?

A. Not a regular date, but dates supposed to be a month apart, whenever we can reach them and the barges are available for inspection.

Q. Is this "T. N. 73" entered with your company?

A. Yes.

Q. Did you personally make any inspections of the "73"?

A. I did, sir.

Q. Over how long a period of time approximately had she been under your inspection?

A. Under my personal inspection from August 30, 1937, to September 5th, 1937, and under my assistant's inspection here in July.

Q. On those occasions was the boat loaded or light?

A. The boat was light.

Q. What did you find on your inspection with respect to her condition?

A. I found that the barge "T. N. 73" was in safe working order and condition and seaworthy in all respects, so far as it was possible for me to ascertain.

Mr. Matteson: I object to that as a conclusion. I think this witness ought to specify what examination he made and what he found. The question of seaworthiness is a question for the Court.

Mr. Erskine: I am perfectly willing to ask him.

The Court: All right, reframe the question, but I think a similar question has been asked several times without objection.

Q. Tell us in detail to what extent you went over the barge on those inspections?

A. I looked over first the deck equipment as to anything which would cause accidents, inspection of the booms for the handling of cargo lines, the topping, falls, runways, gear, and apparatus on deck.

The Court: Not on this barge?

The Witness: Yes, on this barge.

The Court: Are you sure you have the right barge?

The Witness: Yes.

The Court: Did this barge have booms?

Q. Did you make any written reports on the inspection?

A. Yes.

Q. Have you got them here?

A. No, I have not got them here. They are in my office.

The Court: Well, this was a molasses tank barge.

The Witness: Yes, that is right, and it has one boom for the handling of the steam hose.

The Court: Oh, I see.

The Witness: And the discharge lines or the filling lines.

[fol. 176] The Court: This is the first we have heard of that. That is the reason I misunderstood you. Go ahead.

The Witness: And then I took a look down in the fore-peak and afterpeak tanks and cargo tanks when dry, to see if there is any evidences of leakage.

Q. On those inspections did you find any evidence of leakage?

A. Yes.

Q. Did you find anything on those inspections to indicate any unseaworthiness of the barge?

A. No.

Q. Did you see the barge in New York after she was raised and put on drydock?

A. I did.

Q. Were you there on the same day as these other surveyors who have testified?

A. I was.

Q. When you saw the barge did you have any special interest in your examination of her?

A. Yes, I was interested to ascertain what the apparent cause of the sinking was, whether or not she was apparently seaworthy at the time.

Q. Tell us how extensively you examined the boat yourself.

A. I first walked around the outside of the barge in dry-dock, examined the bottom, had a chip hammer. I found one rivet which was leaking at the turn of the bilge of the port tank on the after side. That was tight otherwise except a slight weep and a couple of weeping rivets in the forward peak tank. Otherwise the tanks, the cargo tanks particularly, appeared to be all intact and dry. However, the plates at the turn of the bilge on the port and starboard sides of the cargo tanks forward, aft and midships had large indentations as though it had been caused by the wires around the barge during the salvage operations when they were lifting it up.

Q. Did you go inside the barge afterwards?

A. I went down into the forward and after cargo tanks and found that there was apparently no damage there out-[fol. 177] side of what I have described as to the indentations of the plates. On the deck, the after part, it was found that the deck had partly sagged down, given way, due to some reason, perhaps during the salvage operations. I went into the forward and after tanks and found no evidence of any unseaworthy condition.

Q. What condition did you find the several bulkheads in fore and aft of the cargo spaces and the center?

A. They all appeared to be tight.

Q. Did you find anything to answer the inquiry you were making as to whether she sank from any unseaworthiness?

A. There was no condition that I found which would cause her to sink from unseaworthiness.

Q. You mentioned this matter of finding some weeping rivets. Is that unusual?

A. No, we usually find a number of rivets that may have a slight weep to them, but they would not cause any leakage to amount to anything.

Q. Would you consider a barge unseaworthy in that condition?

A. No, sir.

Q. Would they cause any damage to cargo?

A. I only found one rivet in the cargo tanks, and that was at the turn of the bilge on the port side aft that had a slight weep, and that would not be sufficient to cause any damage to cargo.

Q. Why?

A. Because all cargo—the barge, when it is light, sits on top of the water in the vernacular of the sea, and before you put cargo in it is light and she is inspected to see whether or not the tank is dry, otherwise cargo is not put in. If the tank is dry the cargo goes in and the pressure inside becomes greater than outside so you have a leakage outward if there was a leak instead of inward to the cargo.

Q. In the case of a weeping rivet is it possible for the cargo to leak out?

A. Very slightly. In this case it would apparently amount to practically nothing.

Q. You were unable, then, to find anything in the condition of the barge to explain any leakage to account for sinking?

A. I was unable to find any condition in the barge which would account for the sinking.

Q. Did you reach any conclusion as to what caused her to sink?

A. Yes.

Mr. Matteson: I object to that.

Mr. Erskine: I will withdraw the question.

The Court: When we finish with this witness, we will adjourn until eleven o'clock tomorrow morning, gentlemen, as I have a matter at four o'clock. Proceed with the witness.

Cross-examination.

By Mr. Matteson:

Q. When you load a heavy load like molasses, the level of the molasses will always be level with the water outside.

A. Not necessarily, no.

The Court: If it ever got above it what would happen to the boat?

Q. It may be that in certain stages of loading that will be the case, that the level of the molasses in the boat will be below the level of the water on the outside.

A. Only at the very beginning. The barge when it is light it should draw 15 to 20 inches; then you would have a condition where the water outside would be above what it is inside.

The Court: You should not forget there were those peak tanks.

The Witness: Which add buoyancy.

Q. The testimony here is, as I recall it, that when this barge is loaded the cargo is about 3 feet below the deck on the inside and that the barge has about 14 inches freeboard on the outside. Have I misstated that?

[fol. 179] Mr. Erskine: I know of no testimony of 14 inches on the outside. Oh, yes, 14 inches freeboard, I beg your pardon.

Q. And the cargo is three feet below the deck on the inside.

Mr. Erskine: I believe that is the testimony.

Q. In that condition the cargo on the inside would be below the water level.

A. For molasses, yes.

Q. So it is so when she is fully loaded and it is so when she begins to load?

A. No, if the boat was hung up by the stern lines then it would be different.

Q. Well, we will put this assumption that the boat is properly loaded on an even keel. If she has 18 inches of draft when she starts the cargo goes right into the bottom of the barge, doesn't it?

A. Yes.

Q. She begins to load at 18 below the water level outside.

A. You are talking about this particular barge?

Q. And this particular kind of cargo.

A. Yes.

Q. And from that point you continue to the point where she is fully loaded, you have also got a condition where the molasses is below the water level on the outside?

A. That is right.

Q. So there always will be a margin in there?

A. With molasses, yes.

Q. Where the water level is higher on the outside?

A. Yes, sir.

The Court: I don't think it is very important. This at the most would be a weeping rivet.

Mr. Matteson: This case is not over yet and there is a lot more to it.

The Court: I mean so far as this testimony is concerned. [fol. 180] Mr. Matteson: When the case is all in you have to consider all the inferences here from everything.

The Court: Yes, I understand what my duty will be.

Q. So as the cargo rises on the inside there will always be a margin on the skin of the ship where if there is any leak the water will come in and won't be obstructed by the cargo?

A. For molasses, yes.

Q. Now, the purposes of your inspections are principally for safety, for personal injuries, and things of that type?

A. No, both. Safety is the general term covering both accident prevention and seaworthiness of ships in which we are interested.

Q. Are you interested in cargo claims as well as personal injury claims?

A. We are.

Q. And it was for your association in the preparation of the defense of this case that you made your investigation?

A. No, never.

Q. How did you come to make the investigation?

A. My investigation was made before—my inspections of the ship were made before this case ever happened.

Q. I am referring to the examination that you made after the accident.

By the Court:

Q. In the drydock.

A. That is right.

Q. For whom did you make that inspection?

A. The United States P. & I. Agency.

Q. Were they on one of the policies?

A. Yes, P. & I.

Q. What do they cover?

Mr. Erskine: They would be the policy interested in cargo damage.

[fol. 181] By Mr. Matteson:

Q. Now did you inspect the barge on drydock at the same time the other surveyors, Mr. Hansen of the North American, and Mr. Lynner, were there?

A. Yes, sir.

Q. Was your examination of a similar character to theirs; I assume you all went together and looked the boat over.

A. I made my examination independently of theirs.

Q. Did you go into the cargo hold?

A. Yes, sir.

Q. Did you go in through the hatch amidships?

A. The ladder I went down went into the cargo hold.

Q. You don't remember which hatch it was?

A. No.

Q. One of the other men said there was a quantity of water on the floor between the beams, six inches, or so. Is that right?

A. That is correct.

Q. And the whole hold was pretty messy, is that right?

A. Yes.

Q. The other surveyors said they could not get into the peak tanks; is that correct?

A. I don't see why they could not get into it, I got into it without any difficulty.

By the Court:

Q. What did you find?

A. I found a mixture of mud and water in the bottom.

Q. Was there any water in there in addition to mud?

A. Yes, there was a little water in there.

By Mr. Matteson:

Q. How much water was there in the peak tank?

A. I didn't step down into the hold, that is, into the peak tank or sound it. I should say three or four inches of water.

Q. You say you didn't step down into that?

A. No, sir, I reached down and tested it to find out what it was and it tasted salty and muddy.

[fol. 182] Q. Where were you standing when you reached down?

A. From the ladder.

Q. You were standing on the ladder?

A. Yes.

Q. You didn't get off the ladder to go around inside?

A. No.

Mr. Erskine: Inside what, the peak tank?

Q. Inside the peak tank?

A. No.

Q. Which peak tank did you go into?

A. Both of them, forward and after.

Mr. Erskine: I offer in evidence, if the Court please, the document which I understand Mr. Matteson will stipulate was the contract under which this molasses was being carried, it being agreed that where the name Dunbar Molasses Corporation is set forth in the original contract, the contract has been taken over by Commercial Molasses Company, Incorporated.

The Court: The Commercial Molasses has absorbed the Dunbar?

Mr. Erskine: Yes, sir.

The Court: And absorbed the contract?

Mr. Matteson: I don't know just the details, but the Commercial is doing the business formerly done by Dunbar, and both parties have carried on with this contract.

(Contract marked Petitioner's Exhibit No. 6.)

Mr. Erskine: In connection with that contract, I wish to offer on the record a stipulation which I understand, Mr. Matteson is willing to make in two divisions: First, I understand it is stipulated that Commercial Molasses Corporation [fol. 183] did not insure this cargo for the account of New York Tank Barge Company, Inc. and/or the barge.

Mr. Matteson: That is correct.

Mr. Erskine: Now I understand also that Mr. Matteson will stipulate the following facts in connection with the insurance: The cargo which was laden on the barge "T. N. No. 73" had been purchased by Commercial Molasses Corporation from United Molasses Company, Limited, of London, England, to be delivered by that company c. i. f. at a United States port into shore tanks or barges provided by the purchaser. The barge "T. N. No. 73" was a barge supplied by the purchaser to receive delivery of the cargo.

Pursuant to this contract of sale the title passed from United Molasses Company, Limited, to Commercial Molasses Corporation upon delivery of the cargo into the barge.

In the settlement of the transaction between the vendor and the vendee the vendor held the vendee responsible for payment of the molasses which had been discharged into the barge "T. N. No. 73" pending its efforts to collect the loss under the vendor's insurance for the account of the vendee. The vendor's insurers abroad finally paid the loss and the

vendee was thereupon credited with payment in full of the amount due with respect to the purchase price of the cargo discharged from the motor vessel "Athelsultan" into the barge "T. N. No. 73".

Mr. Matteson: I would like to add to that that this suit is brought by the Commercial Molasses Company for the account of the insured.

Mr. Erskine: I object to that, that injects an entirely new matter. On the facts I have just stated, the stipulation which I have read was that the vendors collected that insurance and collected it against the purchase price for the Commercial. I don't see under this stipulation what claim Mr. Matteson has at all.

The Court: He says he is here attempting to establish his claim in this proceeding to the full amount of the claim for the benefit of the insurance company that insured the vendor.

Mr. Matteson: The insurance was for the benefit of whom it might concern and was collected by the vendor for the account of this vendee and the insurer on payment is subrogated.

The Court: Who paid the premium?

Mr. Matteson: That is part of the purchase price of the goods. The goods were sold c. i. f., cost, insurance and freight.

Mr. Erskine: I object to the inclusion of that item in the stipulation. I am relying on a contract here which involves a question of the availability of insurance for this loss. I, of course, have no direct evidence as to what the Molasses Corporation did. I went to Mr. Matteson and I said, will it be necessary for me to subpoena your people or will you stipulate that there was insurance. I asked him to stipulate that there was insurance and that it had been paid, and I think Mr. Van Hagen wrote this letter and he said, I will give you the stipulation in this form, and I have read all that he said he was willing to stipulate. There was nothing at that time said that they wanted me to include in the stipulation that they were bringing this action for the account of underwriters.

Mr. Matteson: There is no doubt about the facts here and we can prove them if we have to.

The Court: Mr. Erskine cannot stipulate to facts not in his knowledge. If you wish to show him the documents so [fol. 185] he can agree to that separate stipulation for your

benefit, he may do so tomorrow morning. If there is any doubt as to what the real facts are make arrangements to have witnesses subpoenaed and the documents here so we can finish the case tomorrow.

You look into that, Mr. Erskine.

Mr. Erskine: All right, sir. The petitioner rests.

(Whereupon an adjournment was taken to 11:00 A. M., October 28, 1938.)

New York, October 28, 1938;

11:45 A. M.

### Trial Resumed

Mr. Erskine: If your Honor pleases, last night Mr. Matteson asked me to allow him to state on the record that this claim was being filed for account of underwriters, and we have reached the solution of that by my agreement, which is that I will accept that statement for the purposes of the trial, with the reservation that if the decision goes against the petitioner and there is a reference on damages I may ask him for his proofs. It seems to me it is strictly a question of damages really. I understand that is agreeable to Mr. Matteson.

Mr. Matteson: Yes, that is a satisfactory arrangement, if your Honor pleases.

I take it that you are not calling any of the salvors who raised this barge?

Mr. Erskine: I am not calling them, no.

Mr. Matteson: The reason I bring the point up is they refused to talk to me on the ground that you employed them [fol. 186] and they would have to protect your interests.

Mr. Erskine: I have no objection to your talking to them. As a matter of fact, I never have.

The Court: If you wish to call them you always have the right of subpoena, you know.

Mr. Matteson: If your Honor pleases, I would not call them without having some idea of what their testimony was, and as they were not employed by me they are not naturally within my scope.

Mr. Erskine: Isn't it a fact that your client, or the Molasses Company, had a representative present at the salvage operations?

Mr. Matteson: Yes.

The Court: I assume they would.

Mr. Matteson: We did not send any divers below the water to determine conditions there, and our only observation was in connection with the recovery of the cargo which was pumped out while the cargo was below the water.

The Court: And as the barge was lifted, I suppose?

Mr. Matteson: Yes, sir, as it was lifted, yes.

MICHAEL LANZA, called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Matteson:

Q. Mr. Lanza, by whom are you employed?

A. M. J. Garpinello.

Q. In what business?

A. In weighing, inspecting, sampling and gauging.

Q. Did you have something to do with the gauging of the [fol. 187] cargo from the ship "Athelsultan"?

A. I was there on the ship.

Q. Were you there while the cargo was discharged from the ship into the barges Navadegora "78" and "73" on October 23rd to 24th, 1937?

A. I was there at the discharge of the molasses from the ship into the barge "No. 73".

Q. Just describe what your duties were in that connection?

A. My duty is just to stand by and see that everything is going in operation, pumping from the ship into the barge tanks.

Q. And you are stationed on the ship, as I understand it?

A. On the ship.

Q. Can you tell us what time the discharge into the "No. 73" began?

A. At nine-five.

Q. And from that time on where were you?

A. On the ship.

Q. Now, what was the last you saw of the Navadegora "73", or "T. N. 73", before she sank; what was the last time you saw her?

A. It was about 12:55.

Q. What happened at that time?

A. I just looked over the side of the ship to see how the

barge was getting on, and the mate was on board of the barge. The mate of the barge was on board and I asked him how everything was going and how long it will take to finish the barge.

Q. What reply did you get?

A. He said in about half an hour.

Q. That was at 12:55?

A. That was at 12:55.

Q. What did you notice in respect to the condition of the barge at that time?

A. As far as I could see the barge was on even keel, I would say.

Q. During that period between 9:05 and 12:55 were you on the ship?

A. I was on parts of the ship.

Q. During that time did you at various times see the "No. 73" during the process of loading?

A. Yes.

Q. And was there anything unusual in connection with the loading of the barge?

A. No, sir.

[fol. 188] Q. Everything appeared to go all right?

A. Yes, sir.

Q. Was the pumping from the ship continuous during that time?

A. Yes, sir.

Q. Were these the only remarks that were exchanged between you and the mate of the barge at 12:55?

A. At that time, yes, sir.

Q. What did you do after that, after this conversation at 12:55?

A. I left the ship and went up to the dock to telephone.

Q. Did you return to the ship after that?

A. Yes.

Q. At what time did you return to the ship?

A. I returned to the ship about 1:10.

Q. What did you find in respect to the condition of the barge at that time?

A. When I returned to the ship the stern of the barge was under water.

Q. What did you do then?

A. Then I immediately ran up the dock again and called my boss, Mr. Garpinello, at home.

Q. Did you see the barge after that?

A. Yes, sir.

Q. You went back to the ship?

A. Yes, sir.

Q. What time did she finally sink, do you know?

A. She was under water at 6:00 A. M. in the morning, all under water.

Q. Have you gauged the "73" on various occasions?

A. No, sir.

Q. Is this the first time you had anything to do with her?

A. Yes.

Q. Do you know what her capacity for this type of cargo was?

Mr. Erskine: I object, there is no foundation laid.

Mr. Matteson: I simply asked him if he knows.

The Court: The objection is overruled.

Q. Do you know?

A. No, sir.

Q. Is that all you know about this matter?

A. That is all.

[fol. 189] Q. You did not have anything to do with the barge after she sank?

A. No, sir.

Cross-examination.

By Mr. Erskine:

Q. Do I understand correctly that you or your firm were representing cargo interests?

A. Yes.

Q. Your duties were to watch the operation of the discharge from the ship into the barge to see that everything went all right?

A. Yes.

Q. You did not go down on the barge at any time after she started to load?

A. No, sir.

Q. You had no gauge showing the quantity being pumped at any given moment into the barge?

A. No, sir.

Q. There was no way that you could tell how many gallons had been pumped into the barge at any given time?

A. No, sir.

Q. You were relying on the men on the barge to tell you when they had enough?

A. Yes.

Q. You say you had never anything to do with the "73" before?

A. No, sir.

Q. So that you knew nothing about what her trim would be when she had a normal full load?

A. No, sir.

Q. When you looked down over the side of the ship at, I think you said, 12:55, about?

A. About, yes.

Q. Did you take a record of it from your watch, what time it was?

A. Yes.

Q. You looked at your watch?

A. Yes.

Q. Your watch said 12:55?

A. About that.

Q. Why do you say about if you looked at it?

A. I just looked at my wrist watch at the moment.

Q. You mean now you do not recall exactly what time it was?

A. Well, it was 12:55, as near as I can remember.

Q. You did not make any record of that?

A. Mr. Garpinello has all the records.

Q. Did you make a record of the time? Did you write it [fol. 190] down on a sheet of paper, that you talked to the mate at 12:55?

A. No.

Q. When you looked down from the side of the ship, how much higher would you say you were standing on the side of the ship than the deck of the barge?

A. I could not answer that question.

Q. You were above the barge?

A. Yes, I was on the deck of the ship.

Q. And that was quite a little above the barge, wasn't it?

A. Yes.

Q. 15 or 20 feet?

A. I could not say.

The Court: Well, how much?

The Witness: Maybe about 10 feet.

Q. From that position, looking down at the barge, you could not tell whether the stern was somewhat lower in the water than the bow?

A. No, sir.

Q. Have you acted as an inspector on other ships discharging molasses into barges?

A. I am not exactly an inspector.

Q. I mean, have you had experience on other ships discharging molasses?

A. On and off.

Q. Do you know whether it is a fact that as a ship progresses in discharging molasses, the flow of the discharge through the discharge pipe is apt to increase in speed?

A. I do not know.

Q. Do you know how it is discharged from the ship?

A. Under steam.

Q. Under steam pressure, isn't it?

A. Yes.

Q. That is, they pour steam into the tanks and that forces the molasses out, is that right?

A. Yes.

Q. Don't you know that as that progresses the steam, the heat, tends to warm up the molasses and make it more fluid so that it flows faster?

A. I never followed that up.

Q. Then at this time you had no idea at all how fast that molasses was running into the barge?

A. No, sir.

[fol. 191] Q. You think from the moment you had your talk and until you got back to the ship after telephoning was only fifteen minutes?

A. About that, yes.

Q. Did you time it again when you came back?

A. I looked at my watch again as soon as I came back.

Redirect examination.

By Mr. Matteson:

Q. Were they using the ship's pumps to pump the molasses, do you know?

A. Yes.

Q. A suggestion was made here that the only thing that forced the molasses out of the ship was steam pressure in the tanks, is that right, or were they operating pumps?

A. They were operating pumps.

Q. Do you know where they put steam in the tanks?

A. I don't.

Q. The same pumps were in operation all the time, were they?

A. I don't know.

Q. To the best of your knowledge was there any change in the rate of pumping while the discharge was going on?

Mr. Erskine: I object to that. You mean the speed of the pump or the flow of the molasses?

Mr. Matteson: I am asking just what he knows.

The Court: Well, does he know? Do you know anything about that?

The Witness: No, sir.

The Court: The rate of discharge from your ship?

The Witness: No, sir.

Recross-examination.

By Mr. Erskine:

Q. When the "T. N. 73" came alongside, you had finished filling another barge before that, hadn't you?

A. I do not remember if I was on the ship at the time or not.

Q. When the "T. N. 73" came right alongside the ship did [fol. 192] you go down and look at her?

A. No, sir, Mr. Garpinello made the inspection. He was on board the ship at the time.

Q. You did not bother to go down again?

A. No, sir.

Q. You could have gone down if you wanted to?

A. If I wanted to, but Mr. Garpinello made the inspection so I thought it would not be necessary.

Q. Did he tell you it was all right?

A. Yes.

Q. You could have gone down at any time on the barge if you had wanted to, to see how the molasses was in there?

A. Yes.

By Mr. Matteson:

Q. Have you had any experience with ships other than gauging—that is all you know about ships, sampling and gauging?

A. Yes, sir.

MICHAEL J. CARPINELLO, called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Matteson:

Q. Mr. Carpinello, what is your business?

A. We are official inspectors, weighers and gaugers for the New York Product Exchange.

Q. Is Mr. Lanza an employee of yours?

A. Yes, sir.

Q. Were you employed by the claimant, the Commercial Molasses Corporation to gauge the cargo of the "Athel-sultan"?

A. No, by A. N. McNamara.

Q. You were engaged to gauge that cargo, however?

A. Yes, sir.

Q. Who are A. N. McNamara?

A. He represents the United Molasses Company, Ltd.

Q. They were the sellers of the cargo?

A. Yes, sir.

[fol. 193] Q. Mr. Lanza was your representative on the job in gauging the "No. 73", is that right?

A. Yes, sir.

Q. Did you make a calculation of the cargo which was loaded into the "73" before she sank, the amount of molasses that was loaded into the "73" before she sank?

A. A calculation, yes.

Q. Will you tell us what you based that on?

A. On the pumping time.

Q. And what information did you have on that point?

Mr. Erskine: I would like to enter my objection to any hearsay on this point.

The Court: I assume you will establish what the records were he got his information from.

Mr. Matteson: I am here to give all the information I can, your Honor. If it doesn't turn out to be enough, all we can do is to give the best we can.

A. Do you want—

Q. Just tell us the information you got upon which you based your calculation?

The Court: And from whom you got it.

Q. You said you based it on pumping time?

A. On pumping time.

Q. I suppose you got the time of starting pumping from Mr. Lanza who just testified?

A. Yes, sir, and that was also checked with the third officer of the ship. The ship's log will show the exact time, the same time I have in these records here.

Q. And that was 9:05?

A. That was 9:05; loading started at 9:05 Saturday, October 23rd.

The Court: P. M.?

The Witness: P. M. The barge sank at 1:10 A. M., Sunday, October 24th.

[fol. 194] Q. Now from that how did you get at the——

A. The pumping time was four hours and five minutes. Now what do you want to know?

Q. You must have a little more information than that?

A. Yes.

Q. What else did you take?

A. Assuming that the barge would have taken her usual cargo of 175,000 gallons——

Mr. Erskine: I object to that.

Mr. Matteson: That will be connected, your Honor.

The Court: I will take it subject to connection.

The Witness (continuing): At the time the barge sank she had loaded approximately 165,042 gallons, because at 12:55 it was mentioned to the third officer and my man at the ship, or at least the barge, would have had her load of about 175,000 gallons in another half hour's time.

Mr. Erskine: I object again.

Q. You don't know whether 175,000 was mentioned at that time? It was simply she would have had her full load?

A. Her full load.

By the Court:

Q. You base that part of your calculation on the statement of your employee, Mr. Lanza, that he had a talk with the mate of the barge at 12:55. Lanza just testified here.

A. Yes.

Q. And the mate said he would be finished in about half an hour?

A. Yes.

By Mr. Matteson:

Q. Why did you estimate that the full load of the barge would have been 175,000 gallons?

[fol. 195] A. When I received the telephone call from my man that the barge had sunk I immediately went to the ship. I guess it took me about an hour. The captain and the mate of the barge were in the smoking room laying down sleeping or laying down, and I questioned everyone concerned with this operation.

Q. You mean the master and mate of the barge?

A. Yes, and the third officer and Mr. Tooney, representing the Commercial Molasses Corporation, he was also interested, and other people that saw it.

By the Court:

Q. When did you get to the ship?

A. About an hour after I received the telephone call.

Q. When was that?

A. About 2:15 A. M. Sunday morning.

Q. That is when you reached the ship?

A. Yes, sir.

By Mr. Matteson:

Q. Go ahead and tell us what transpired there.

A. The third officer was on duty at the time and I questioned him and he also said that he got word—you see, while the operation is going on our men occasionally shout down to the barge captain as to how long it will be before he will have his load. And during the course of pumping why he is probably asked maybe half a dozen times, maybe every half hour or every fifteen or twenty minutes or so, and we can only go by what the captain or mate of the barge tells us, because we are aboard the ship and he is aboard the barge.

Q. Yes.

A. And the last time he was asked was about 12:55, as to when he expected to have his full load, and he said in half an hour.

Q. So you had to use that as the basis of calculation?

A. I had to use that as the basis of calculation, and that [fol. 196] was also mentioned to the third officer of the ship because—

The Court: In your presence?

The Witness: Yes, sir.

By the Court:

Q. Who mentioned it?

A. The third officer of the ship told me he was told that in about a half an hour from 12:55.

Q. Who told him that?

A. The one on duty on the barge.

The Court: I am receiving this just to show the basis for his calculation.

Mr. Erskine: I think it may go in for what it is worth; I don't think it is worth anything.

By Mr. Matteson:

Q. There is one thing we haven't cleared up and that is what basis you had for taking 175,000 gallons as a full load.

A. While we were sitting in the smoking room the third officer and myself asked the question as to what she would have taken as a full load and the answer was 175,000 gallons.

Q. Who made that answer?

A. I cannot say whether it was the mate or the captain, but it was either one of the two because they are the only people I could get that information from.

Q. Have you any other information of the capacity load of the "73" with this type of cargo?

A. On the previous ship I have a record here that shows that she had taken 174,706 gallons.

Q. And have you gauged other cargoes on the "73" before that?

A. Oh, yes.

[fol. 197] Q. A number of times?

A. Yes, sir.

Q. Well, did what they told you about her capacity, about what her full load would be, check with what you knew about what she had carried previously?

A. Yes.

Q. So your calculation was made on the proportion of the total assumed pumping time that had elapsed before the barge sunk, is that right?

A. Yes.

Q. Now, that, of course, assumes a constant rate of pumping, doesn't it?

A. Yes.

Mr. Erskine: I object. Does he mean the pump speed or the flow of the molasses?

Q. We will put it that way. I don't see that there is any difference. That assumes a constant flow of molasses at a steady rate?

A. Yes.

Q. How long have you been in this business, Mr. Carpinello?

A. Twenty-five years.

Q. And on the basis of your experience is that a fair assumption to make with respect to this type of cargo?

A. Yes, sir.

Q. You were not on the ship when the discharge was actually going on?

A. I was there when the ship arrived and I was there examining the barge tanks and I was there when the ship started pumping. When everything was working smoothly I gave my instructions to my man and told him just what to do.

Q. You say you made an inspection of the tanks of the barge?

A. Yes.

Q. For what purpose?

A. As to its cleanliness.

Q. Tell us what you did and what you saw?

A. I went aboard the barge and opened the tank covers and looked in to see if they were clean and stuck my head in to smell to see if there were any foreign odors that might be injurious to the molasses, and I found the tanks were dry and clean and previously contained no molasses.

[fol. 198] Q. The barge was light at that time I take it?

A. Yes.

Q. You didn't go into the tanks?

A. No.

Q. And your observation was of the cargo tanks?

A. Yes, sir.

Q. Well, Mr. Carpinello, did you have any other check on the quantity of cargo pumped into the barge besides this calculation that you made?

A. You mean on some previous ship?

Q. No, I mean on this particular cargo. Did you have any way of making a check as to whether your calculation of approximately 165,000 gallons in the "73" was correct?

O. Only by what we discharged into the shore tanks at Weehawken and Albany, and the invoice amount, the invoice tonnage. The invoice—the bill of lading tonnage on this was 13,347 long tons.

Q. Yes.

A. And according to the discharge I have a record here of 13,211 long tons, showing a loss of 137 tons.

Q. How many tons?

A. 137 tons.

Q. Is that an abnormal difference in a full load?

A. No.

Q. Would you or would you not say that your conclusions along this line tended to confirm your conclusion as to the amount discharged into the barge?

A. Well, at times there is a larger loss, depending on the kind of molasses.

Q. Put it this way: Is there anything about your check of the total outturn from the ship that raises any question in your mind as to the correctness of your calculation of how much went into the barge "73", or does it seem to confirm it?

A. It sort of checks according to my figures here.

Cross-examination.

By Mr. Erskine:

Q. As I understand it, in a shipload of molasses there is some normal loss?

A. Yes.

[fel. 199] Q. And that varies?

A. Yes, sir.

Q. You don't know how much it varied on this ship?

A. No.

Q. You are simply assuming that the figures you have mentioned fit with 165,042 gallons charged against the "T. N. 73". It is an assumption, isn't it?

A. Well, yes, we are assuming we had 165,000 gallons in the tanks.

Q. What I mean is, so far as these records go that you are referring to, I mean on the "T. N. 73" at the time she sank, there might have been more or less to some extent?

A. Yes, but not very much, very little difference.

Q. This molasses was being pumped out of the "Athel-sultan" under pressure?

A. Yes, sir.

Q. Strictly speaking it was being forced out by steam pressure?

A. It was pumped out.

Q. You mean the pumps pump the steam into the tanks?

A. No, they have pumps aboard ship that sucks up the molasses through the pipe line right through the pump.

Q. What has the steam pressure in the tank got to do with it?

A. Steam pressure?

Q. Don't they force steam into the tanks to force the molasses out?

A. No, sir, the heat was only through the steam coils to heat the molasses. Steam would have a tendency to degrade the quality of the molasses so they wouldn't dare to pump steam in.

Q. The flow of the molasses depends on the extent that it is fluid?

A. It depends on the temperature.

Q. And that varies?

A. That varies.

Q. It may fall during the course of discharging?

A. Not much, because an inspection is made very often and the temperature taken on each tank of molasses during discharge. It is almost impossible to pump molasses if it is not heated to a temperature of around 90 degrees Fahrenheit.

Q. What I want is a plain answer. Is it not a fact that the flow of molasses does vary during the discharge; that is [fol. 200] so, isn't it?

A. It all depends if the temperature is kept even.

Q. But you don't know what the temperatures were on this ship, you didn't go around and keep them, did you?

A. I may have a record of the temperatures taken at various times, but I would have to look all through my papers.

Q. You don't know how fast that molasses was flowing out of the ship into the barge that night?

A. No, not until we started to figure it.

Q. You are now trying to work out some figures. Do

you know how fast the molasses was flowing out of the ship into the barge that night?

A. Not until I spoke to the third officer and questioned him about it.

Q. All you know is what the third officer told you?

A. He would know.

Q. So far as you were aware did the third officer have any gauge to register the exact number of gallons flowing through the pipe, so far as you know?

A. There is no gauge.

Q. The whole thing is an estimate, isn't it?

A. Yes, approximate.

Q. And it is subject to some variation?

A. Yes, sir.

Q. And did I understand you to say that it was the practice to ask the men on the barge about every twenty minutes if they were full or ready to stop?

A. Yes.

Q. That would seem to indicate some variation in the length of time. Why should you be asking every twenty minutes if you were able to count on a set time for filling the barge?

A. So you can telephone and find out when you can expect the next barge.

Q. If I recall right Mr. Matteson the other day suggested that this barge could take a full load in four hours. Is that possible?

A. Yes, sir, she has taken full loads in four to four and a half hours, sometimes four, sometimes four and a half, sometimes five hours. It varies according to the temperature of the molasses.

[fol. 201] Q. So if the man on the barge told your representative at 12:55 he was going to require another half hour he might very well have been wrong as far as you know—as far as you know he might have been wrong?

A. Within ten or fifteen minutes, yes.

Q. Are the heating coils of the tank usually down at the bottom in the ship?

A. Yes.

Q. So as the unloading progresses the remainder of the molasses is apt to get more of the effect of that heat?

A. The remainder of the molasses?

Q. As the molasses in the tank goes down, as it is being pumped out, that would have more effect of the heat from the coil?

A. No, they shut down the steam to 90 degrees Fahrenheit.

Q. If the heat was left on it certainly would have more effect?

A. Yes.

Q. Is it not a common fact in discharging a ship of this type, the flow is apt to increase somewhat as the loading progresses from the ship, that is the last part comes up faster than the first?

A. It comes out slower.

Q. The last cargo comes out slower?

A. Yes, sir.

Q. You mean on account of difficulty in sucking it down to the bottom?

A. Yes, and on account of foam.

Q. Before you get to the last dregs of the cargo as unloading is progressing, the speed of the flow is apt to increase until you get down to the end, isn't it?

A. No, I wouldn't think so.

Q. Do you know how much molasses of the 13,000 tons was left in the ship after the "73" went down?

A. In the ship?

Q. Yes, in the ship.

A. There was a whole load that had to go up to Albany.

Q. What do you mean by a whole load, a barge load?

A. No, not a barge load. The ship discharged part of her cargo at Weehawken, and the ship sailed up to discharge the balance of the cargo at Albany.

[fol. 202] Q. How much did she discharge up at Albany?

A. Up in Albany she discharged 651,303 gallons.

Q. Was that the balance of the cargo?

A. Yes.

By Mr. Erskine:

Q. All of these figures that you have on discharge at New York and Albany involve these variable factors of the ship's loss, don't they?

A. These figures we get at Albany are exact and the figures we get at Weehawken are exact. Then we take the approximate gallons of the barge after it sunk in order to get the whole cargo.

The Court: Give us the figures of the molasses you discharged at Weehawken and tell us into what barges you discharged it and how much into each barge?

The Witness: The full amount discharged at Weehawken was 20,391,133 pounds.

The Court: How many gallons was that?

The Witness: 91.3 long tons. I have not got the gallons here.

The Court: Have you a record of what you put in the various barges at Weehawken? I assume it was all discharged at the barges in Weehawken?

The Witness: The barge pulls alongside the ship and is loaded there and then is towed to the Weehawken shore tanks and pumped from the barge into the shore tanks.

The Court: What is the record that they made at Weehawken when the barges were discharged? You must have some records there.

The Witness: The only record we have is when we calibrate the shore tanks on the opening gauge, and when the barge is through discharging into the tank we take a gauge again, and the difference is what was put into the tank. We [fol. 203] do not take each barge load and figure how much went into the tank.

The Court: You mean to say they keep no record at Weehawken of what amount they get from each barge that is brought there?

The Witness: No, sir, the measurement is taken by the customs gauger at the opening and the closing of the gauge, and the difference is what was pumped into that tank.

The Court: How do you pay the barge freight?

The Witness: The customs gauger is there gauging the the tank with us. He is the man that decides that.

The Court: No, I am asking how the Molasses Company pays the barge freight. How do you figure the load that is aboard? Do you figure it so much a trip, or so much a ton or what?

The Witness: That I don't know.

Mr. Matteson: I do not think you quite understand what he was saying. He said with respect to these—if I am misstating anything or putting it into your mouth, why, correct me—but as I understand it it is this, at Weehawken they discharge into the barges. Then they immediately take the barges to the tanks and discharge the barges into the shore tanks.

The Court: The tanks are at Weehawken?

Mr. Matteson: The tanks are at Weehawken and the gauging is done in the tanks.

Mr. Erskine: Yes, but they said they put all the barges in one tank and calibrate it.

The Court: He said they kept no record of what they get from each barge.

Mr. Matteson: They do not.

The Court: Do you keep any record of what goes from the ship into the barge?

[fol. 204] Mr. Van Hagen: It is all done by measuring at the shore tanks. When the motor vessel comes into the harbor, when the large tanker comes in, she has so much cargo that is supposed to go to Weehawken. They know how much they have in the shore tanks at Weehawken. When they get through with so many barge loads they know the increase in the shore tanks at Weehawken.

Mr. Erskine: We understand that.

Mr. Van Hagen: And the freight is based on the measurements taken in the shore tanks at Weehawken after they are all through.

The Court: But suppose they have drawn something out of those tanks in between barge deliveries, do you keep a record of that too?

The Witness: The customs puts the seals on the valves so that they cannot tamper with that tank.

The Court: Suppose they have an order for it and they want to deliver some of the stuff out of the tanks?

Mr. Matteson: The duty has to be paid on all this and they cannot tell anything—

The Court: Are they bonded tanks?

The Witness: Yes.

By the Court:

Q. They are all bonded tanks?

A. Yes.

Q. Then there is some time when the molasses is taken out of the tanks for sale, isn't there?

A. Yes.

Q. Does it ever happen that molasses is taken out of a tank during the day when other molasses is still being delivered to the tank?

A. Yes, but they have to get permission from the customs.

Q. Well, records must be kept. Now, where are those records with respect to this cargo from the "Athelsultan"; [fol. 205] have you got the records of the tank?

A. The records of the tank would be in the Weechawken office of the Commercial Molasses.

Mr. Matteson: Don't you have some records there yourself of the gauging of the tanks?

The Witness: Yes, I have here—yes, in this case I have a record, your Honor.

Q. Where did you get it?

A. After each barge load was pumped into the tank we took a record of the pneumericator reading. That was the record of it.

Q. Nothing was pumped out during that time?

A. No.

Q. All right. Tell us what the total was after each barge. After barge "No. 78" delivered its load, there was an indication that the amount of molasses in the tank had been increased by so many gallons?

A. I have not got it worked out to the gallons for each load. I have not got each load worked out to the gallons.

Q. What have you worked it out to?

A. The pneumericator reading, that is, pounds per square foot, which was the official record at the time. That can be worked out. I can give you that, but it will take quite some time. I have got to work by factors.

Q. Suppose you submit that.

A. Yes.

The Court: Suppose you submit that in a schedule, Mr. Matteson.

Mr. Matteson: Anything at all that will throw light on the case. Of course, this is a case of approximation at best.

The Court: A day or two ago in discussing how much molasses was put in the barge "T. N. 73", it was suggested one way in which they could be figured would be to find out what there was in the ship and then what the ship did with [fol. 206] all the balance of its load, except what had been pumped into "No. 73", and then make a deduction, and I suppose making some allowance for wastage.

Mr. Matteson: I think Mr. Carpinello has all that. Perhaps he has not it exactly in the form your Honor asked for, but he has the figures that give the result. He can

tell us in pounds how much was put into the Weehawken tanks.

The Court: Can he tell us in pounds what there was in this ship too and what there was in pounds delivered at Albany?

Mr. Matteson: Yes.

The Court: And we want to know how many pounds less wastage went into the "73".

Mr. Matteson: Yes.

The Court: All right, let us have the figure. How many pounds at Albany, can you give me that?

The Witness: Yes, 7,131,752 pounds, plus steamings 206,120 pounds.

By the Court:

Q. What does that mean?

A. In this particular case they were satisfied to use steam in the ship's tanks in order to get what was remaining on the sides, and in that way she was very, very light, and an allowance had to be made for water. Then, of course, what we approximate of the barge that was sunk. I get a total of thirteen thousand—well, it is worked out in tons. I will have to work that out.

Q. How much would be the weight of 165,000 gallons?

A. I figure about 187 gallons to a long ton. That would make it 882 long tons.

Q. 165,000 gallons into pounds would be what?

A. I could not say whether in this case it was 11.7 pounds per gallon or 11.9. That makes quite a difference.

[fol. 207] Mr. Matteson: The reason he has figured it out in tons is because the invoice covering the cargo on the ship was in tons for comparison. Everything was reduced to tons.

The Court: Well, tons are too large a unit. Let us get it down to pounds or gallons. Now, you gave me the number of pounds at Weehawken as 20,391,133?

The Witness: Yes.

By the Court:

Q. The number of pounds at Albany as 7,131,752?

A. Yes.

Q. Plus steaming of 206,120?

A. Yes.

Q. That was also at Albany?

A. Yes.

Q. Now, that gives you a total of how many pounds—27,729,005?

A. Right.

Q. Now, in pounds what was the total cargo of 13,347 long tons?

A. I will have to multiply that by 2240. 29,897,280.

Q. Now, deduct from that the 27,729,005?

A. 2,168,275.

Q. You figure 136 long tons loss, is that it?

A. No, 882 long tons.

Q. No, lost. You figure a loss of 136 long tons?

A. Yes.

Q. Now, what would that be?

A. 304,640 pounds.

Q. Now, take that off the 2,168,275?

A. 1,863,635 pounds.

Q. And that is what you figure went into the "73", is that it?

A. Yes, sir.

Q. And that would figure out in gallons how much, do you know?

A. I would have to get the weight per gallon. You see, some molasses weighs more than others.

Q. How much did this molasses weigh, do you know?

A. I think it was 11.9 pounds per gallon.

[fol. 208] Mr. Matteson: Can you check that? I notice you use 187 gallons to the ton.

The Witness: That is what I figure, by 187 gallons to the ton. It is about the same in working one way or the other. It is about 156,200 gallons.

By the Court:

Q. Do you figure about that, plus what?

A. I did not get you, your Honor.

Q. What do you figure in gallons 1,863,635 pounds of this molasses to be; how does it figure in gallons, using 11.9 pounds to the gallon as you suggested, is that right?

A. Yes.

Q. What does that figure in gallons?

A. 156,607 gallons.

Q. That is what went into the hold of the "Barge 73", is that right?

A. Yes.

The Court: Go ahead.

Cross-examination (resumed).

By Mr. Erskine:

Q. Mr. Carpinello, how, from my understanding, is it a fact that you computed the 165,042 gallons first on the basis that your man told you that the mate had estimated another half hour at 12:55, is that right?

A. Yes, and also the mate told me.

Q. And you figured something else that the third mate of the ship told you about the average gallons per hour being pumped out of the ship, is that right?

A. After calculating it, yes.

Q. Oh, I beg your pardon, you started with the assumption that the full load would be 175,000 gallons?

A. Yes.

Q. And then working from the time that the mate of the barge had estimated, you figure that she had 165,042 aboard, is that the way you first arrived at it?

A. Yes, by figuring with the third mate.

Vol. 2091 Q. And then afterwards these other figures you referred to as some sort of a check, is that right?

A. These figures we just gave now.

Q. The figures of total discharging here and at Albany and the ship's total load, you checked back against that and came to the conclusion that 165,042 gallons was the right amount to charge against the "T. N. 73", is that what you did?

A. No, sir.

Q. I thought you told Mr. Matteson that these figures had indicated to you that that was the correct amount?

A. The figures that I got at Weehawken and Albany are accurate figures, but I could not get those figures at the time I was on the ship with the mate.

Q. I know that, I am talking about some later time.

A. Oh, yes.

Q. I understood from Mr. Matteson that you used these figures at some later time to check up your estimate of 165,000, is that right?

A. No, sir, I did not do it to check up what was in the barge, no, sir.

Q. Then your 165,042 gallons is merely a computation made by you on your report of how much the barge would take, the time that was left at 12:55, and the statement of the third officer of the ship, as the average speed per hour, that is how you got this figure?

A. Yes.

Q. But you have told us, I think, that on the previous load the "T. N. 73" carried only 174,000?

A. 760 gallons.

Q. Do you know of any load when she carried less than that?

A. No, I might look through my files further and find some more records of the "73". I just happened to pick up this file. This is the first one I came to and I happened to take this with me.

Q. Have you any record of what freeboard the "T. N. 73" had when she carried that other load?

A. No, sir, we are not interested in that.

Q. You told Mr. Matteson how you made your inspection of this barge and what you found. It is a fact, is it not, [fol. 210] that if you had found any evidence of water leaking into that barge you would not have passed her, is that right?

A. No, sir.

Q. Is that right?

A. Right.

Re-direct examination.

By Mr. Matteson:

Q. Do you know whether the cargo was discharged from the "Athelsultan" in to these barges by use of pumps or whether it is forced out of the tanks by steam?

A. Pumps.

REDVEES HOCKEN, called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Matteson:

Q. Captain Hocken, what is your business?

A. Marine surveyor.

Q. By whom are you employed?

A. Toplis & Harding.

Q. They are Lloyds agents of New York?

A. Yes.

Q. Did you have something to do with the cargo that was lost on the barge "T. N. 73"?

A. Yes.

Q. On October 23rd, 1937?

A. Yes.

Q. In what connection did you have to do with it?

A. For the adjustment of the loss.

Q. That is, you were the cargo surveyor and you adjusted the loss?

A. Yes.

Q. Do you remember when you first knew about this or how you came—when you went over there?

The Court: May I interrupt your examination, while I think of it? What was the total number of pounds or long tons that was paid to the United-British Molasses Company [fol. 211] for the entire shipment on the "Athelsultan"; have you the record of it here?

Mr. Matteson: I have a record but I do not think it will give your Honor what you have in mind. Here it is right here. Here is the photostatic copy of it, but it bills the Commercial Molasses for the amount that was received at Weehawken and Albany and the Albany steamings, and then with respect to this cargo that was lost on the "T. N. 73" it simply states that they reserve the right to debit the buyers with this, pending the efforts to collect the insurance, as we stated on the record.

The Court: What I wanted to know is what was the amount that was paid to the British-United for the cargo of molasses. What did it figure out as the number of pounds of molasses or long tons of molasses that was paid for?

Mr. Matteson: Exclusive of this cargo, 27,769,364 pounds of molasses, exclusive of what was on the "73".

Mr. Erskine: I do not see that anywhere on the document. Why should they exclude it? They pumped it out of the ship.

Mr. Matteson: Yes, but that item was held in abeyance and the Commercial Molasses was not required to pay for it, pending the vendors' efforts to collect the insurance on the buyer's behalf.

Mr. Erskine: I understood that they reserved the right to credit that matter against the total but I do not see anything in that document that the "73" is excluded.

Mr. Matteson: I will offer the document in evidence and you can interpret it and I can interpret it.

The Court: I want to see how close these figures would check with the figures we have been working out with Mr. Carpinello here this morning.

[fol. 212] Mr. Erskine: Here is what was discharged at Weehawken and Albany from the ship. Why isn't that the total there?

Mr. Matteson: I would not say that it was because each item noted as received has been analyzed and converted into pounds of sugar and the payment is on the basis of pounds of sugar.

Mr. Erskine: They give you the pounds and the long tons. I have no objection to it going into evidence. I don't know what it means, but it may as well go in.

The Court: I figure that would come very close to the total shown in your tanks at Weehawken and the total at Albany, because the total was 27,729,005, so it is within 40,000 pounds.

Mr. Matteson: It should be the same thing.

The Court: What would that be in gallons?

Mr. Erskine: Around 300 gallons.

The Court: And, of course, the shipper stands the waste?

Mr. Erskine: Yes.

(Marked Claimant's Exhibit C.)

By Mr. Matteson:

Q. I am not going to ask you all you did because a good deal of it was talking with people. But you did go to the barge after she was sunk?

A. Yes.

Q. And you were there during the salvage operation?

A. Yes.

Q. Who conducted the salvage operation?

A. That was conducted by Merritt, Chapman & Scott Corporation.

Q. Who made the contract with Merritt, Chapman & Scott Corporation?

[fol. 213] Mr. Erskine: I object unless you know. Did you make the contract?

The Witness: No, we did not.

Q. Did you see the contract?

A. I have seen it, yes.

Q. And it was made by whom?

A. The New York Tank Barge with Merritt, Chapman & Scott Corporation.

Q. It provides for the raising of the barge?

A. Yes, sir.

Q. And what in respect to the cargo?

A. That was limited to the salvage value of the barge and not to exceed \$5,500.

Q. And then did they make any agreement with respect to the cargo?

A. Well, sir, we also agreed to make an effort to save the cargo by pumping into a barge. It was to be pumped and it was to be limited to part value saved. It was understood that a cargo representative——

The Court: Is this paper the witness is reading from in evidence?

Mr. Matteson: He is reading from the contract which he says he saw.

Mr. Erskine: I do not think I have any objection to the contract.

The Court: Put it in evidence.

Mr. Erskine: I object to his report but not to the contract. Do you claim we did not salvage the boat properly?

Mr. Matteson: No, I am just pointing out the relationship of the parties.

Q. They also agreed to make efforts to save the cargo?

A. Yes, sir.

Q. And that was part of the agreement with the New York Tank Barge Company?

A. Yes, sir.

Q. How was the barge raised?

A. By means of slings.

[fol. 214] The Court: You do not claim that was an admission that they were liable or responsible?

Mr. Matteson: No, sir.

The Court: The arrangement was they were to make an effort to save the cargo for interested parties?

—Mr. Erskine: Are you suggesting that there was any error or fault in the salvage operations?

Mr. Matteson: No.

The Court: Go ahead.

Q. How was the cargo saved—was some saved?

A. Yes.

Q. In what manner was that done?

A. When they were finally able to raise the barge they pumped some molasses out.

Q. Did they pump some out while she was on the bottom?

A. It was a mixture of water that was valueless, and then they brought around the "T. N. 78" and then when they got to good molasses they pumped it into the "T. N. 78".

Q. A good deal was wastage but you got some good molasses?

A. We got some good.

Q. After the barge was pumped out was she brought to the surface?

A. Yes, sir, in slings.

Q. Were you there when she was brought to the surface?

A. I was on the pier at the time she broke surface.

Q. Was there work done on the barge by divers?

A. Yes, sir.

Q. That covered a period of several days?

A. I have the exact days here.

(Recess until 2:00 o'clock P. M.)

[fol. 215]

Afternoon Session

2:00 P. M.

REDVERS HOCKEN, resumed.

Direct examination.

By Mr. Matteson (continued):

(Last question and answer read.)

Q. What dates did that underwater work cover?

A. We attended on October 29 on board the salvage vessel "Century".

Q. The 29th, and how long did it continue?

A. Until November 3.

Q. How much molasses did they succeed in getting out of the barge, can you give us an approximate amount?

A. 51,222 gallons.

Q. Was that all good molasses?

A. No, sir, we had good, poor and fair.

Q. And then there was a lot mixed with water that was pumped overboard?

A. That was pumped overboard, yes.

Q. Was there another cargo surveyor in attendance there at that time?

A. Mr. Haynes.

Q. Whose interest did he represent?

A. Despard & Company appointed him.

Q. For whom?

A. The barge owner.

Q. Were you there when the barge was brought to the surface afterward?

A. Yes, sir.

Q. What did you observe as to her condition at that time?

A. She was covered with mud and molasses.

Q. Did you notice the condition of her hatch covers at that time?

A. Well, I was on the pier at that time and from what I could see the majority of the hatch covers were open.

Q. Did you take notice at any time of the peak hatch cover?

A. At that time I cannot really recollect if it was open, but [fol. 216] when we returned to the barge about seven P. M. that night, to the best of my knowledge, the after peak tank was open.

Q. What time of day was she brought to the surface?

A. About eleven A. M.

The Court: What day, November 1st?

The Witness: November 1st, yes.

Q. You were gone from that time until about seven P. M.?

A. About seven P. M., yes.

Q. In the meantime had the barge been pumped out?

A. They had commenced pumping.

Cross examination.

By Mr. Erskine:

Q. As I understand it, they saved about 51,000 gallons of molasses?

A. 51,222 gallons.

Q. So if there had been 165,000 gallons originally on board when she sunk the greater part of it is gone?

A. Right.

Q. And I understand that would be accounted for by lightening the boat under water so they could raise her?

A. Yes, sir.

Q. She was raised by these slings fore and aft amidships?

A. Yes, sir.

Q. You saw nothing about the barge when she came to the surface other than what you might expect to see in a barge that was sunk and pumped in raising her?

A. Right.

Q. The first time you have any recollection the peak tank was open?

A. That was when I returned around seven o'clock.

Q. I understood you to say you had no specific recollection of it before that?

A. That is true.

Q. So far as these hatches are concerned it would not be unusual for the salvors to open those hatches to raise the boat, would it?

A. No.

[fol. 217] Redirect examination.

By Mr. Matteson:

Q. You didn't see the barge again on drydock or at any other time?

A. No, I did not.

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CLARENCE L. BURKE, called as a witness on behalf of the claimant, being duly sworn, testified as follows:

Direct examination.

By Mr. Matteson:

Q. Mr. Burke, what is your occupation?

A. Engineer and surveyor.

Q. Are you independently so engaged?

A. I have been—before I went by myself I was with Charles E. Ross, and previous to that I was with the United

American Line as port engineer, and previous to that was with the Standard Oil Company and the American Hawaiian Line.

Q. And now you are practicing as an independent surveyor in New York?

A. Yes, sir, I am.

Q. Were you employed to make an examination of the barge "T. N. 73" subsequent to her sinking on October 23, 1937?

A. I was.

Q. By whom were you employed?

A. Lloyd's Agency.

Q. Did you at their request make an examination of the barge on drydock?

A. I did.

Q. When was that?

A. On November 5.

Q. Were there at the same time other hull surveyors there with you to examine this barge, were you with them?

A. No, sir.

Q. When was it with respect to the other examination?

A. My understanding it was the day before.

Q. When you were there what was the position of the barge?

A. They were just getting ready to float her off the drydock. I went there early in the morning; they were finishing up welding.

[fol. 218] Q. Will you tell us what examination you made or were able to make of the barge and what you found?

A. I went around the shell of the barge and it was mostly welded up at that time. It had been broken by the slings, and then she had been holed to drain the peaks and the patches had been welded over those places. Around the hull of the barge, though, I didn't see any evidence of any leaks. There appeared to be somewhere around 1500 short rivets.

Q. What do you mean by short rivets?

A. They were under the plates. When a rivet is driven it is usually flush with the plates. These were under considerably.

Q. What does that mean?

A. It means your points are partly wasted. They may be tight; you cannot tell without further examination.

Q. How would you be able to tell whether rivets in that condition were leaky or not?

A. I could not tell on that job without testing them and you would have to test that from the inside and she wasn't clean enough for that.

Q. How would you test a hull with rivets of that kind to determine whether it was tight or not, how would you make a test to find whether they were leaking?

A. With a hammer to see whether they were slack, whether they had been started or not.

The Court: Did you make that test?

The Witness: No, sir.

Q. Why not?

A. For one thing, they were getting ready to float the barge and I didn't have time, and the other reason was she was not properly cleaned up for making such a test.

Q. What was her condition with respect to cleanliness?

A. She was coated with molasses all over on the inside.

Q. Did you go inside the barge?

A. I went into the after tank and into the after peak.

[fol. 219] Q. What condition did you note in the cargo tanks first?

A. Mostly a dirty condition. She was messed up with molasses.

Q. When you say "messed up", just describe where you saw the molasses.

A. All over, on the sides, and frames, and on the floor.

Q. The molasses hadn't been cleaned off the shell of the vessel?

A. It had been roughly cleaned but not cleaned properly.

Q. Now you say you went into the after peak tank?

A. Yes, sir.

Q. Just describe to us what you saw when you went into the after peak tank.

A. That was about the same condition as the cargo tanks, there was molasses all over it.

Q. What did that indicate to you?

A. That there had been molasses in the tanks.

Q. Is that a tank where molasses is carried?

A. No, sir.

Q. How could molasses get in there?

A. There might have been a leak. I didn't see any signs of any.

Mr. Erskine: I object to that.

The Court: The objection is overruled.

The Witness: I don't know.

Q. Mr. Burke, was this molasses the same as it was in the cargo holds or was it diluted molasses?

A. The conditions of the space were about the same as the cargo hold with regard to molasses.

Q. The molasses on the side was of the same consistency as in the cargo holds?

A. As near as I could tell it was.

Q. Did you actually go into the after peak tank, I mean, you went down into it?

A. Yes.

Q. Did you just stand on the ladder or did you go out into the tank?

A. I went into the tank and went far enough to see where they put the patch on to make sure it was a hole that had [fol. 220] been burnt in for drainage purposes, as I said, and enough to look over the bulkhead roughly with the flashlight. There was a very strong smell of burnt molasses there from welding that patch on, and I could not stay in there very long.

Q. Did you make any test of the bulkhead between the after peak tank and the cargo tank to determine whether it was tight or not?

A. No test, no.

Q. How would a test have to be made?

A. Well, it would have to be thoroughly searched and it would have to be properly cleaned in order to make that.

Q. Could a water test be made of the tightness?

A. Yes, to determine whether the bulkhead was tight.

Q. How would a water test be made?

A. You could fill up either your cargo tanks, or you could fill up your peak tank. The caulking side was in the peak tank, of course, if you wanted to make it tight. Even a hose test would have determined it to a certain extent.

Q. Was any such test made by you?

A. No, sir.

Q. Why not?

A. Well, I had no time to do it. The boat was just ready to go off the drydock and be hauled away.

Q. Had any such test been made by anybody, do you know?

A. Not that I know of, I don't know.

Q. Are you familiar with this type of barge? You saw the construction of the barge, did you not?

A. Yes.

Q. And assuming that this barge was loading with a cargo of molasses and there was leakage into the after peak tank, what would the effect be on the barge and her cargo?

Mr. Erskine: I note an objection to that. There is no testimony of any leakage into the after peak tank.

The Court: I know there is not, but he is just asking him to assume that.

[fol. 221] A. It would transfer the weight further towards the end of the barge.

Q. And if the barge were partially loaded with molasses, what effect would it have on the cargo?

A. With the barge loaded with slack tanks of molasses, if you were by the stern your cargo would gradually creep that way, because it would go deeper all the time by the stern.

Q. What do you mean by slack tanks?

A. A tank not full, with a space over head.

Q. What is the effect of slack tanks, what is the difference between a slack tank and a full tank?

A. A full tank it would not make any difference if she was by the stern or not. If the tank was full your weight could not shift.

Q. But when the tanks are slack then there is an opportunity for the weight to shift, is that right?

A. That is right.

Q. A barge of this type, the testimony is that she can not carry her tanks full of molasses. You would always have slack tanks then in a barge of that type, wouldn't you?

A. You would.

Q. What can you say of that condition of carrying cargo in slack tanks?

Mr. Erskine: I object to that.

The Court: I do not know what the answer is going to be. What do you mean by that? I think the question should be made more definite.

Mr. Matteson: I was trying to avoid leading him.

Q. Well, what sort of a condition does that create with respect to the safety of the barge when you are carrying your cargo in slack tanks?

A. It would allow your weights to shift and might cause a list or a drag either way.

Q. Would you say that was a condition that required care?

A. It would. You would need to keep your weights [fol. 222] equally distributed all over your barge, keep her on an even keel.

Q. Did you go into the forward peak tank?

A. No, sir, I just looked in there.

Q. What did you observe as to the conditions in the forward peak tank when you looked in there?

A. That appeared to be clean. There had never been anything but water in that.

Mr. Matteson: Have you got that repair bill that was offered in evidence?

The Court: You mean the one of May, 1937?

Mr. Matteson: Yes.

Q. Mr. Burke, the testimony in this case is that this barge was built about 1917, so that in 1937 she was about 20 years old, and that her plates were steel plates, and that in May of 1927 some repairs were made to the barge, among which were items to which I am going to call your attention.

A. Yes.

Q. One item is this: Welded hole and thin pits in tank bottom. What would that indicate with respect to the condition of the plate where that repair was required?

Mr. Erskine: I object as not relating in any way to the condition as existing in October, 1937.

The Court: You mean what the condition was before the welding took place, is that it?

Mr. Matteson: I want to have the witness point out what the significance of that is.

The Court: I will take it. The objection is overruled.

The Witness: There apparently had deterioration taken place at that particular point.

Q. Do steel plates deteriorate in that manner?

[fol. 223] Mr. Erskine: I object to that as leading. He answered you about a particular point, not about steel plates.

The Court: The objection is overruled.

Q. Will you answer the question.

A. Plates will deteriorate in local spots or in some places to a more or less degree than others.

Q. What can you tell us about pitting in steel plates?

Mr. Erskine: I object, unless he is going to testify to a condition that existed in this boat, your Honor.

The Court: I do not know if the condition was corrected if it makes much difference, but I will take it.

Mr. Matteson: I am perfectly willing to state what my point is.

The Court: The objection is overruled.

A. Lots of times on vessels pitting will take place in a steel plate along a certain line, which might be at the edge of where water or something has stood, say, in the bilge. It will usually pit in a line, although other parts of that plate might not be affected. Usually on that line you will find pits, in some places deeper than others, all the way along.

Q. Well now, Mr. Burke, tell me this: a barge 20 years old with steel plates, where pitting has actually been found in one or more plates, does that give you any indication as to whether the same condition would be likely to occur or be likely to be found in other plates at any time after that?

Mr. Erskine: I object.

The Court: I will take it as a very indefinite question, though. I do not see that it will be much help.

A. It would make you look further.

[fol. 224] Q. Is it or is it not a fact that once pitting has been discovered in the plates of a barge of this type at one time, it would be likely to show up on almost any inspection after that in other places?

Mr. Erskine: I object to that as leading.

The Court: The objection is overruled.

A. It would.

Q. I want to ask you about another thing. An item in this repair bill is "Baled out water, cleaned, chipped, and

burned limber holes in the after peak." Do you know what that means?

A. Yes.

Q. What would be the purpose of burning limber holes in the after peak?

A. To keep your bars drained.

Q. Drained where?

A. Down into the bilge.

Q. These limber holes, I think the testimony was to this effect, would be burned in the beams.

A. Yes.

Q. Would that be along the rake?

A. Along the rake, across the rake.

Q. And the purpose of that is drainage, is that right?

A. That is right.

Q. What inference do you draw from the fact that it was necessary to burn limber holes in these beams in the after peak in May of 1937?

Mr. Erskine: I object to the word "inference."

The Court: The objection is overruled.

A. I would not take any inference from that. It is usual in any longitudinal frame ship when they are first built to have those limber holes there. It is just to keep your bar drained. It should have been in from the beginning.

Q. And if they are not in what is likely to be the effect?

A. Then you are liable to have corrosion take place there.

[fol. 225] Q. The accumulation of water along the beams?

A. The accumulation of water along the beams without drying.

Q. How would that take place in the after peak, assuming that the after peak did not leak?

The Court: Was this in the after peak?

Mr. Matteson: Yes.

A. It could be from condensation.

Mr. Erskine: I object to that and move to strike it out.

The Court: I will take it.

Q. Is condensation in the interior of a vessel a common occurrence?

A. Yes.

## Cross-examination.

By Mr. Erskine:

Q. This pitting that you have been talking about you say is apt to occur in a particular place?

A. Yes.

Q. And in this bill, Exhibit 2, the item which Mr. Matteson referred to is an item reading Welded hole and thin pits in tank bottom, and the item is carried out for a charge of \$10. I suggest to you that this bill and that item would indicate that there was not very much wrong with this barge in May, 1937 with respect to pitting, is that a fair inference?

A. I should say \$10 would put on a patch about 6 by 8 inches.

Q. What I mean is if that was the only incident they found, there would be no indication that there was very much wrong in this barge from pitting?

A. It would be an indication that there was no further pitting at least that would be serious at that time.

Q. It might also indicate that there was no other pitting at all, might not it?

A. It might.

Q. But you don't know?

A. I don't know.

[fol. 226] Q. If this barge were surveyed by a competent surveyor, particularly one representing the hull underwriters, or by any other competent surveyor, in May, 1937, and all they could find that the barge required was this bill of \$263 total, I put it to you, you think that they did not think there was very much the matter with that boat, is that so?

A. That depends on the length of time it had been running that would not be a large repair bill, no.

Q. That is not what I asked you. I say, it would indicate that they could not find very much the matter with the boat.

A. No, sir.

Q. When you saw the barge on the dock, I understood you to say that from your examination you could find no evidence of any leakage, except the places where they had already welded the salvage damage, is that right?

A. That is right.

Q. Did you also say that you saw molasses all over the deck?

A. No, there was no molasses dragged around there from where men had been going in and out.

Q. Was there molasses on the deck?

A. Oh, there was.

The Court: I think it was the other witness said that when the barge was raised there was mud and molasses all over the deck, is that right?—the witness just before this man.

Mr. Matteson: Yes.

Q. There is testimony that a large part of this cargo of molasses had been pumped out when the barge was under water.

A. Yes.

Q. That would account for a pretty general smearing of the deck, wouldn't it?

A. It would.

Q. And if the after peak tank had been open, it would account for molasses getting into the after peak tank, wouldn't it?

A. It would.

Q. Did you notice that the deck of the barge was damaged over the after area?

A. Yes.

[fol. 227] Q. You agree with the other surveyors that have testified that that would have resulted from the raising operations; do you agree with that—the salvaging operations, the raising?

A. That is quite possible.

Q. Don't you think it is also possible in that connection that something might have happened in that stern peak area which might have permitted the molasses to get into the after peak tank?

A. Well, molasses is heavier than water and it would seem as if it would come out of the tank and go down into the after peak tank.

Q. No, but they had been pumping it out, hadn't they?

A. Yes.

Q. Pumping it out below water. What I am putting to you is that that pumping out below when the barge was submerged, that might account for finding some molasses in the after peak tank, might not it?

A. It is possible, although I do not see how.

Q. About these short rivets, you do not know that they were leaking?

A. I do not know that they were leaking, no.

Q. And your explanation for not making a test is that you could not go inside and make the test with the molasses still in the boat, is that right?

A. You could not make a proper test. There was another reason—they were getting ready to float the barge and I would not dare go in there and hammer rivets or start any rivets just when they were going to float her.

Q. You could have tried one rivet from the outside, couldn't you?

A. No, not to properly test it.

Q. Couldn't you test the rivet from the outside?

A. Not to make the proper test of a rivet, no.

Q. Which side was the head of the rivet on?

A. On the inside.

Q. You mean to say you could not have taken a hammer and tried it from the outside?

A. I could. I could have knocked one of those rivets in, I think.

[fol. 228] Q. And you did not make a test on a single rivet?

A. No, sir.

Q. What were you there for?

A. To look to see whether I could see anything in the condition that she was in which had caused her to sink.

Mr. Erskine: That is all, thank you.

Q. I would like to ask one more question. You did not mean to suggest that it is wrong for a barge company to carry cargo with what you call slack tanks; that is done every day, isn't it?

A. That is done every day.

Q. You have to do that?

A. There is other barges around which you would not have to do it with, but it is being done right along.

Q. With a barge of this type, it is a common type of barge?

A. It is.

Q. And with a heavy cargo like molasses you could not fill her up all the way?

A. No, sir.

Q. To carry molasses you have to carry it in slack tanks?

A. That is right.

Q. But you said that would require care. Well, any cargo requires care, doesn't it?

A. Yes.

Q. Now you spoke about if anything had been in the after tank that the weight of the molasses would have shifted aft. The only difference that would have made would have been in the freeboard of the boat.

A. That is right, and the trim.

Q. So, if a man were watching the freeboard of the boat he would see the freeboard whether it was caused by anything in the peak tank or in the cargo tank?

A. That would show in the trim, yes.

Q. And when you went into the after peak tank you could see nothing wrong with the bulkhead between that and the after cargo tank.

A. I did not.

Q. The condition was such that you could not have de-[fol. 229] termined if there was anything wrong except by a hose test.

A. Yes, some test. If it had been properly cleaned down you might have been able to find it.

Q. You couldn't see anything wrong with it?

A. I didn't see anything wrong with it.

Redirect examination.

By Mr. Matteson:

Q. Mr. Burke, was this barge built for a molasses carrier, do you know.

Mr. Erskine: I object to that, your Honor. I don't know how this man knows.

The Court: The objection is overruled.

A. I don't know.

Q. One other thing I would like to call your attention to and clear up: Mr. Erskine asked you if it was possible that some molasses might have found its way into the after peak because of the damage in the wrecking operation. In your opinion could the molasses conditions that you saw in the after peak be accounted for by that?

A. No.

Q. Why do you say that?

A. It might have been done from the—I don't see quite how it could have been done.

Q. I mean what were the molasses conditions that you actually saw in the after peak tank? I am talking about the extent and the density of the molasses there.

The Court: How much did you see there?

The Witness: Nothing, except what was smeared around. It had been drained out.

Q. How high did you see it smeared around?

A. All the way to the top over the bulkhead.

The Court: Up to the top of the tank?

The Witness: Practically up to the top of the tank, yes.

[fol. 236] By the Court:

Q. Which indicated to you what?

A. That there had been molasses there.

Q. How much molasses, that the whole peak tank had been filled with molasses?

A. Well, a ton or so might have done it; it would depend on how the barge had been handled.

By Mr. Matteson:

Q. When you say a ton or so could have done it——

A. I say it could have done it.

Q. Do you mean there was a ton of molasses smeared around?

A. I just mean to say it was smeared all over and it could be done—it was not necessary to be absolutely full of molasses in order to get it in that condition; a smaller amount could have done it.

Q. Did it or not indicate to you that there had been a substantial amount of molasses in the after peak?

A. Yes, my conclusion was that there had been a substantial amount in there; how much, I don't know.

Recross-examination.

By Mr. Erskine:

Q. I am left without any intimation as to what you call a substantial amount. Do you indicate there might have been a ton?

A. No, I wouldn't want to pin it down to a ton. I merely said a ton could have made it. My information from my observation was that it had been half full at the very least and washed around.

Q. Are you suggesting that that half full condition came from a leak through the bulkhead?

A. I don't know how it came; I didn't see any sign of a leak in the bulkhead.

Q. There was nothing in the bulkhead which indicated that the peak had filled up half full by leaking through the bulkhead?

A. Not from what I saw.

[fol. 231] Q. And you would expect to see something if there was as much of a leak as that?

A. Yes, sir.

By the Court:

Q. How did that molasses get there?

A. I don't know. It was very dirty down there. There was a lot of smoke from the welding and the burning of molasses in the welding and I didn't stay very long and I couldn't see very well.

Q. How long did you stay?

A. Six or seven minutes.

By Mr. Matteson:

Q. Was there water in it?

A. No, it had been drained out.

Q. They had cut a hole to drain it?

A. That is right.

WILLIAM R. BAGGER, called as a witness on behalf of the claimant, being duly sworn, testified as follows:

Direct examination.

By Mr. Matteson:

Q. What is your business?

A. I am an engineer and surveyor.

Q. How long have you been engaged in that business?

A. Over 23 years.

Q. Tell us in a general way what experience you have had in that line.

A. I am a university graduate.

The Court: Won't you concede his qualifications? How many cases have you testified in?

The Witness: I guess a couple of hundred.

Mr. Erskine: Yes, I will concede Captain Bagger's qualifications.

[fol. 232] Q. Are you acquainted with tank barge "73" in this case?

A. I am.

Q. Are you familiar with the history of that barge?

A. Yes, I am.

Q. When was she built?

A. There were about 10 or 12 of these barges built between 1916 and 1920; they were built at Newburgh for the account of the Scottish-Mexican Oil Company, to be taken to Tampico to carry oil from the oil fields to the oil tankers which could not come over Tampico bar at that time. We at our office examined these barges at Newburgh and at New York on behalf of the underwriters——

Mr. Erskine: I object unless you say you examined them yourself.

The Witness: I examined some of them.

Mr. Erskine: Did you examine the "T. N. 73"?

The Witness: I don't know whether it was the "73" or not, they were practically duplicate barges.

Mr. Erskine: I object.

The Court: I will take it.

The Witness: Our purpose of examining them was for the reason that the underwriters had taken the risk of the voyage to Tampico subject to our approval of the arrangements made.

Q. Do you know from subsequent history how long they were there and when they came back?

A. They came back to New York, some of them, about 1925.

Mr. Erskine: There is a lot going into the record that is hearsay, with no relation to the "73".

The Witness: All right. I saw the barge "T. N. 73" in 1926 at New York.

Mr. Erskine: You know that of your own knowledge?

The Witness: I made a survey of her personally.

[fol. 233] Q. What was the occasion of your seeing her at that time?

A. She had capsized with a cargo of molasses.

Q. These barges, I take it from your testimony, were built originally as oil carriers?

A. Yes, sir.

Q. And you are familiar with their characteristics?

A. I am.

Q. What can you tell us about her suitability for carrying molasses?

Mr. Erskine: Are you charging that this was not a proper type of barge to carry molasses? I don't think it has been pleaded at all.

Mr. Matteson: We have pleaded the breach of warranty of seaworthiness.

Mr. Erskine: This is a complete surprise to me.

The Court: Is it your contention it was not a proper barge to carry molasses?

Mr. Matteson: My contention will be that considering her type and degree of suitability, that certain precautions were required to be observed to make her seaworthy for this kind of a cargo.

The Court: Have you pleaded that?

Mr. Matteson: No, sir. My position is based on my assumptions and on my allegations of the unseaworthiness of the barge.

Mr. Erskine: If you say the barge was not proper to carry molasses I am completely surprised.

The Court: I will take it and we will see what it does shape up to to.

(Last question read.)

A. When this barge is loaded with molasses down to a freeboard of say 12 or 14 inches, the distance between the top of the molasses and the deck will be from 2 to 3 feet. In other words, owing to the weight of the molasses the cargo tanks will not be full when the vessel has been loaded [fol. 234] down to her marks. As a consequence of this, the cargo tanks will be slack.

Q. And what is the effect of that?

A. The effect of that is that the molasses can shift in any direction, and molasses has that property of so-called creeping; and it contains considerable natural momentum, rather, inertia,—once it starts to creep it will continue to do so. Not very quickly, but with a continued motion. The result is that with a barge of this type with slack tanks extreme care must be taken to keep her on an even keel.

Q. Now supposing a barge of this type is loading with molasses and there is leakage into her after peak tank, what would be the result of that?

Mr. Erskine: I object to that as there is no evidence of any leakage to the after peak tank.

Mr. Matteson: We are just assuming it.

The Court: Yes, I think that is the word counsel used, assuming it.

A. With a leak of either sea water or a leak of molasses from the cargo hold into the after peak tank it would alter the trim of the barge so she would come down by the stern and the molasses in the cargo hold would creep after and result in the barge trimming by the stern. If this continued long enough, disaster would take place.

Q. Now, Mr. Bagger, I want to ask you—the testimony is that in May of 1937 there were certain repairs on the barge "73", one item of which is "Welded hole and thin pits in the tank bottom". Assuming that that condition was found in one plate in May of 1937, can you tell us whether or not that indicates anything with respect to the general condition of the barge?

Mr. Erskine: I object again, your Honor.

The Court: Overruled.

[fol. 235] A. It would be an indication that corrosion and pitting was taking place in the vessel.

By the Court:

Q. Even in only one place?

A. In one place. It would require a careful examination.

Q. Suppose that was made at the time; suppose the whole boat was examined at the time, and that condition was found in just one plate.

A. You would repair that plate.

Q. Would that be an indication that it was not found in other plates?

A. No, it would simply indicate—it would indicate two things, that that was the only plate that had been noted, or that that was the only plate that needed repairs at that particular time.

By Mr. Matteson:

Q. And would it indicate anything as to what might be expected in the future?

A. It would be a warning that corrosion was setting in and that conditions would have to be very carefully watched.

Q. I want to call your attention to another item in this repair bill which is the burning of limber holes in the after peak. Are you familiar with what that amounts to?

A. Yes, sir, the framing in the after peak tank on the rake is horizontal and owing to the inclination of the rake, the angles forming the beams, they form a pocket or trough in which water can collect. The purpose of cutting the limber holes was to enable that trough of water to run off down into the bottom of the peak.

Q. And does that, the fact that it was found necessary to cut these holes there indicate anything to you with respect to the condition of the barge?

[fol. 236] Mr. Erskine: That is objected to.

The Court: Overruled.

A. A fair inference is that corrosion had set in in way of the trough.

By the Court:

Q. What do those beams look like?

A. They are angle irons.

Q. What is the thickness of the plates when new?

A. Originally about three-eighths of an inch.

Q. And over a period of 20 years would you expect that thickness to continue, would you expect the plates to be the same thickness at the end of 20 years?

A. No, sir.

Mr. Matteson: Is there any standard as to the life of plates of that thickness?

The Witness: That depends a good deal upon the trade the vessel has been in and the cargo she has been carrying. With an oil tanker if she has been carrying gasoline or other corrosive commodities they don't last very long. It depends also on the number of times she has been hauled out and painted.

Q. Why is that?

A. If you keep your surface well painted you protect it, and if you do not, the surface corrodes and the plates get thinner and thinner.

Mr. Erskine: I want to be sure I am protected in all this. It is entirely speculative.

The Court: I am taking it for what it is worth. It is perhaps speculative and its probative value is another question.

Q. I think you said that leakage in the peak tanks would be likely to cause the cargo to move toward that end of the vessel.

[fol. 237] Mr. Erskine: You refer to that leakage as if he had testified to some. I have not heard any such testimony.

The Court: No, assuming.

Q. Assuming there was leakage in the after peak tanks, the tendency would be to lower the trim of the vessel and cause the cargo to start to shift to that end.

A. Correct.

Q. Have you had any experience of that kind on which to base your information?

A. Yes, I have. A sister ship, the "T. N. 74", in 1927 sank bow first in the river here, the North River, due to the fact that her fore peak filled up. She went down by the bow. The cargo shifted and she upended.

Mr. Erskine: I move to strike that out. It has no bearing here.

The Court: No, it has not. We would have to try that case, too. If the bulkhead did not leak, then what happened to the "74" or the "68" or anything else wouldn't have any bearing on this case, would it?

The Witness: Except there was a case where the fore peak tank leaked and she went down by the bow.

The Court: You would expect that whether it was a sister vessel or a vessel built five years before the sinking.

The Witness: Yes, that is true, but we have some other cases here. The "U. P. 109", that capsized twice.

Mr. Erskine: I object, your Honor.

The Witness: We have another at present in litigation which was loaded with molasses. We have the barge "Idle-wild" that twice capsized,——

The Court: You had leaks in those cases?

[fol. 238] The Witness: Yes, or other circumstances that caused the cargo to shift.

The Court: Yes, and we cannot try those cases here now. That would be true in the case of any kind of a vessel.

The Witness: Not unless the tanks were slack.

The Court: Where you had slack tanks, of course. Do

you know of any barges around the harbor that carry molasses where the tanks are not slack?

The Witness: Yes, sir.

By the Court:

Q. Where they are filled right up to the top?

A. Yes, sir.

Q. What barges are there?

A. One is owned by Lee & Simmons, the Manhattan Lighterage has a number——

Q. Assuming there were, would you say another barge that was used carrying molasses in slack tanks was therefore unseaworthy?

A. I would say it required a very high degree of caution in handling the barge. I think from my experience, having had six or seven cases myself personally, barges with slack tanks loaded with molasses and gas tar and heavy oil with similar characteristics to molasses, it bears out my contention that tank barges carrying molasses should have full tanks.

Q. Would you pass a barge for an underwriter of cargo where you had information that the molasses to be carried in the barge would have to be carried in slack tanks?

A. In the light of my experience, no, sir.

Q. And you never have?

A. No, sir.

Q. How many such barges would you say are in operation around the harbor?

A. For molasses alone or for heavy oil?

Q. Yes, for anything.

A. Well, there are quite a number of tank barges. I suppose [fol. 239] there are at least a hundred dummy barges, that is not self-propelled, but they are perfectly O. K. for oil because the tanks can be filled, and oil has a specific gravity of less than water.

Q. I am asking about barges where they have to be operated with the tanks slack.

A. In other words, in the molasses or heavy oil trade?

Q. Take the molasses trade.

A. I cannot say just how many barges are in that trade, but it is a rather limited number.

Q. And in the heavy oil trade?

A. That is limited also.

Q. Are they passed by underwriters?

A. Apparently, but they also pay for the losses.

Q. They pay for other losses, too, don't they?

A. Yes, sir. I personally would not sanction it in the light of the experience I have had with them.

Cross-examination.

By Mr. Erskine:

Q. You have been here through this entire trial, have you not?

A. Yes, sir.

Q. You have heard all the testimony?

A. I think so.

Q. Did you just hear the last witness say that this was a common type of barge for the carriage of molasses in the harbor?

A. No, I think he differentiated between oil and molasses.

Q. Did you hear me ask him whether this was not a type similar to other barges operated in New York harbor for the carriage of molasses and he answered yes?

A. He may have answered that.

Q. Do you disagree with him?

A. I will say it is done, Mr. Erskine, but I don't approve of it.

Q. It is done all the time?

A. It is done frequently, right.

Q. There is nothing unusual about this type of barge as compared with the every day practice in New York harbor, is there?

A. That is true.

[fol. 240] Q. Now some of these other barges you have mentioned that are operating with slack tanks and carrying molasses, you say capsized or sunk?

A. Yes.

Q. And you say in some instances that was due to lack of care?

A. Yes.

Q. Overloading?

A. Not overloading.

Q. You say there was no case you know of where the sinking was not due to negligence on the part of the man in the way he put the cargo in the boat?

A. No, I think that in two of the cases it was due to an absence of center line bulkheads.

The Court: This boat had a center line bulkhead.

The Witness: Yes, this one did.

Q. Go ahead.

A. Another one, she was hung up——

Q. You mean hung on her lines?

A. That is true.

Q. Did you hear the testimony here about the lines?

A. Yes, but this case I am mentioning she rolled over sidewise.

Q. The lines were holding some of the weight of the barge, is that right?

A. Yes.

Q. In the case you are speaking of the lines were holding the barge?

A. In part.

Q. Now, do you want to say anything? I have no further inquiry.

A. In the particular case that I was referring to the barge lifted sidewise, and it takes considerable less strain to do that than it does to let her down by the ends, due to the fact that she will roll easily.

The Court: She will roll a whole lot more than she will turn from the stem right over to the stern.

The Witness: That is right.

By Mr. Erskine:

Q. Would crude oil tend to protect the plates of a steel barge?

A. Yes, sir.

[fol. 241] Q. And how about vegetable oils?

A. Vegetable oils are slightly acid.

Q. They are not as destructive as gasoline?

A. No, they are not.

Q. Did you know this "73" had been carrying vegetable oils?

A. Yes, I think she had carried palm oil.

Q. About the limber holes in the after peak, did you hear Captain Dernelle explain that when they docked this boat in May they filled the peak with water at the opposite end of the boat so that they could go up on the railroad?

A. I was not here when he testified to that.

Q. He did testify to that. Was there anything unusual in that?

A. No.

Q. That would account for water in that after peak tank?

A. Yes, sir.

Q. It would be obvious if they were going to put water in that tank to have the limber holes in the frame?

A. Yes, sir.

Q. Do you know where these limber holes were cut?

A. In fact the water would have to be removed before they burned holes in there.

Q. Do you know where they burned these limber holes in the "73"?

A. Yes, in those transverse beams.

Q. Does the bill show it?

A. No, but Mr. Baldwin explained it.

Q. You are assuming it?

A. No, Mr. Baldwin testified to that.

Q. Which beams did he testify to?



A. That they were the transverse beams on the rake.

Q. Where are they?

A. There is a series of them.

Q. All the way up?

A. Yes.

Q. You are assuming that this after peak tank was in the habit of filling all the way to the top by leakage?

A. I did not say that, but the condensation would gather on them.

Q. If you are attributing the necessity of limber holes [fol. 242] to the fear of leakage, how do you account for putting limber holes all the way up to the top of the peak tank?

A. Condensation would gather on them, the sweat.

Q. When you spoke about filling up the tanks so that there would be no slack, isn't it a fact that in filling a tank barge you have to allow for expansion?

A. Some. You have expansion trunks for that purpose.

Q. If there were not some slack you would blow the deck off, wouldn't you?

A. Possibly, swell it up.

Q. Don't they all have an ullage space; don't all these tank barges allow for ullage space?

A. Ullage space in the expansion trunk?

Q. That is, the space between the cargo and the deck?

A. No.

Q. They do not?

A. No.

Q. Where do you allow for the expansion?

A. In the expansion trunk.

Q. Those are particularly boats that you do not like, is that it?

A. No.

Q. Anyway, you do not like these molasses barges?

A. I think the barges are all right for what they are designed for, but not for molasses.

Q. In spite of the fact they are used all the time for molasses?

A. Yes, with occasional disastrous results.

Q. And in spite of the evidence I think here that Mr. Baldwin had operated this boat from 1926 to 1937 for carrying on this type of cargo, including molasses, you still say it is not a safe type of barge?

A. One sank in 1926 and the other one sank last year.

Mr. Erskine: All right, that is all. I rest, your Honor.

Mr. Matteson: If your Honor pleases, there is only one other thing that I can do. This case is not as satisfactory a one as most cases are because there is so much that has [fol. 243] to be left to the imagination and it is going to turn a great deal here on the question of burden of proof. There is only one other thing that I could do. There is the third officer of the motorship "Athelsultan". On the next return of the ship to this port after I was retained in this case a number of months ago, the man had left the ship and he is now residing in Liverpool and I have not been able to get his testimony.

The Court: You now apply for a deposition?

Mr. Matteson: No, sir, I would only want his testimony in any event in rebuttal after the testimony of the petitioner had gone in. Of course, at this stage of the game it is not possible to get it. I have a statement of his which was taken by Captain Holden, one of the witnesses for the petitioner here. It has his card on it. I found it in my file. I will make a formal offer of it, but I suppose Mr. Erskine will object to it. But I want to be on the record as having offered it.

The Court: Do you think it is admissible?

Mr. Matteson: I will admit that it is not admissible if he

objects to it, but I am just doing everything I can to give light on the facts of this case.

Mr. Erskine: There are two things in this document, your Honor, which I object to as immaterial and subject to cross-examination. Otherwise I would have no objection to the document going in.

Mr. Matteson: What are those statements?

(Discussion between Court and counsel.)

The Court: All right, it will be received if you have no objection.

(Marked Claimant's Exhibit B in evidence.)

Mr. Matteson: There is only one other witness that could possibly be produced. I have never heard of him until last [fol. 244] night, and I have tried desperately to reach him, but with no success, so I will have to forego that as I cannot ask the Court to hold the case open any longer. So I will rest.

The Court: I will hold the case open as long as you have any evidence on the issues you wish to offer.

Mr. Matteson: If I succeed in locating this man I will call it to your Honor's attention. Then with that I rest.

The Court: How soon before you think you will be able to let me know?

Mr. Matteson: Two weeks. I suppose we should exchange memoranda.

The Court: No, no; first I want you to decide whether or not you need this other witness.

Mr. Matteson: I will know that by tomorrow morning.

The Court: All right, send me a letter to that effect, with a copy to Mr. Erskine.

Mr. Matteson: Or I will know by Monday.

(Briefs to be exchanged by November 14th, 1938, and answering briefs to be exchanged by November 21st, 1938.)

New York, March 3, 1939; 2:00 P. M.

### Trial Resumed

WILLIAM LILLGE, called as a witness on behalf of the petitioner, having been first duly sworn, testified as follows:

Mr. Matteson: If your Honor please; before we proceed may I again state on the record my objection to the reopen-

ing of the case and point out that in a case where the case [fol. 245] must be decided on the burden of proof it seems to me it is peculiarly unfair to the party who must rely on that burden of proof. That motion is simply for the record.

The Court: Counsellor, I filed a memorandum in this case in which I stated that I thought there were certain parts of the record that should be supplemented by additional testimony. Neither side had called any of the divers who examined "Tank Barge No. 73" while it was on the bottom in the slip over in New Jersey and I stated that I wanted the diver or divers produced.

I look upon the trial of a law suit as a search for the truth. I have not hesitated in other cases where, after they were submittted, on an examination of the record I found that the record was defective or incomplete, to request the calling of additional witnesses who I thought might have information that would be relevant and material and aid the Court in deciding the issues of fact and that is the reason why I filed this memorandum and requested certain additional testimony.

It is pursuant to that memorandum of mine that was filed on February 24, 1939 that this session is being held and this testimony is being presented.

Mr. Matteson: If your Honor please, it was not at the time that that memorandum was filed that I first noted my objection. This is the first time that I have had an opportunity to put it in the record. I simply wanted to do that.

The Court: I know; you noted your objection in chambers that afternoon and you have the right to put it on the record. But, I feel that in order for me to decide these issues of fact I should have certain additional evidence and that is the reason I have asked for it.

Go ahead, Mr. Erskine.

Mr. Erskine: So long as Mr. Matteson has made the objection I simply want it stated on the record that I am not requesting the reopening of the case.

[fol. 246] The Court: I know you are not, I am. I will assume the responsibility for it. Go ahead.

Direct examination.

By Mr. Erskine:

Q. Are you a diver?

A. Yes, sir.

Q. In October of 1937, were you employed by Merritt-Chapman-Scott?

A. Yes.

Q. Do you recall working on the sunken tank barge "T. N. 73"?

A. Yes.

Q. At a dock in Hoboken?

A. Yes.

Q. Did you go under water and work on the sunken wreck of that boat?

A. Yes.

Q. In connection with raising it?

A. Yes.

Q. Were you the only person that did the under-water work on the boat?

A. Yes.

Q. Do you keep any sort of a written daily log or report sheet?

A. Yes, we do.

Q. Have you those with you?

A. Yes.

Q. Would you mind letting me see them?

A. (Producing papers and handing to Mr. Erskine.)

Mr. Erskine: I have promised his employer, your Honor, that these documents would be returned and I think after my opponent and the Court has looked at them you will note there is nothing on them of any help in the case, it is simply a record of times during which he was working but no comments about the condition of the boat.

Would your Honor like to look at them?

The Court: Yes.

(Papers are handed to the Court.)

The Court: Well, there are a few statements showing in a few words the nature of the work that he did each day.

Mr. Erskine: I intend to question him, your Honor, but [fol. 247] I thought perhaps we might agree. There is no reason for keeping these documents.

The Court: I think we might read into the record the date of each log sheet and what he gave as the particulars of the work he was doing at that time. Are they in chronological order?

Mr. Erskine: There are eight sheets which apparently run from October 24, 1937, to November 1, 1937, inclusive.

The Court: You might read into the record what he wrote there, about the middle of the page, about the particulars of the work.

Mr. Matteson: They can also be photostated and photostats left in place of the originals.

The Court: All right, we will have that done. Did you prepare these sheets?

The Witness: Yes, sir.

The Court: At the end of each day?

The Witness: Yes.

Mr. Erskine: If your Honor please, if your Honor thinks these records should go in I will obtain photostats of them.

The Court: All right, then they will be deemed in evidence as Petitioner's Exhibit 7 and photostats may be substituted.

(Marked Petitioner's Exhibit No. 7.)

Q. When you went down the first time or at any time that you went down to work on the sunken barge will you tell us how she was lying?

A. She was laying on one side at an angle of about 45 degrees, about two-thirds submerged in the mud or slush.

Q. You mean she was canted?

A. Yes.

Q. But was she on the bottom through her full length?

A. Yes, sir.

[fol. 248] Q. Tell us whether or not either at the first time you went down or at any time while the boat was on the bottom you observed any evidence of any leakage through the hull of the boat?

A. No.

Q. Do you mean by that you did not observe it?

A. No.

Q. I want to be sure I understand you right. Is it correct that you did not observe any leakage; is that right?

A. No, I do not know what you mean by leakage. If you mean in collision or damaged—

The Court: Was there anything coming out through any break in the hull or any leak in the hull?

The Witness: No, sir.

Q. Do you remember locating the cargo hatches?

A. Yes.

Q. Have you a recollection of where they were?

A. Yes.

Q. Tell us.

A. There was one forward, one aft, and two amidships.

Q. Do you remember how they were located with the dividing bulkheads of the holds?

A. Yes.

Q. How were they?

A. Each hatch was sitting right over the center of the bulkhead enabling them to go to each side.

Q. So that each hatch opened on opposite sides of the bulkhead? I mean when the hatch was open you could go down either side of the bulkhead?

A. Yes, you could go into two tanks.

Q. And do you remember whether those cargo hatches were flush with the deck or not?

A. No, they were on a coaming, we call it.

Q. About how high?

A. Well, I think about 18 inches or so from the deck, if not more.

Q. Do you recall whether you found some of those cargo hatch covers open?

[fol. 249] The Court: Put it this way: What was the condition in which you found those cargo hatches, and specify each one?

The Witness: The forward hatch, as I call it, the one that was on the highest end of the barge was closed. So were the other two. The after one was partly opened. The lugs, we call them, or screws that set the hatch down were not tight.

Q. In addition to those cargo hatch covers do you recall any manhole hatches into the fore and aft peak tanks?

A. Yes, one on each side.

Q. Did you examine those?

A. Yes.

Q. And what was their condition?

A. They were closed.

Q. Were they open or closed?

A. Closed.

Q. While the barge was on the bottom did your company's wrecking equipment commence to pump out part of the molasses?

A. We did during the time she laid on the bottom. We did.

Q. And how did you do that?

A. We opened the cargo hatches, placed pump suction in the different tanks.

Q. You put in pump suction in those hatches yourself?

A. Yes.

The Court: Which cargo hatches did you open?

The Witness: We did it on the high side aft. Only in two hatches we pumped.

The Court: Where were they located?

The Witness: One was midship on the high side and one in the stern. What I mean by the stern is the place where the coal was on that barge.

Q. When the wreck was raised in the slings was there still some cargo of molasses in it?

A. Yes.

Q. When was the first time that I discussed this case with you at all?

A. Yesterday.

[fol. 250] Q. Before that date had anybody else from my office ever talked to you about it?

A. No, sir.

Mr. Erskine: Your witness.

#### Cross-examination.

By Mr. Matteson:

Q. This barge was raised in slings, was she not?

A. Yes.

Q. You had a big derrick there?

A. We had two.

Q. And the slings were put under the barge as she lay on the bottom?

A. Yes.

Q. And then by means of the slings she was pushed up until her deck was level with the water?

A. Yes.

Q. Then the derricks took her away in that shape?

A. Yes, they took her to some place. I don't know at that time. When the wreck was up I was practically discharged, I wasn't needed any more.

Q. Then the pumping that was done on the wreck was the pumping to take the molasses out?

A. We did not wait to pump all the molasses out.

Q. That was the only pumping that was done, when you took the molasses out?

A. I don't know what was done after but the time I was there we pumped molasses, which floated the boat to a certain extent.

Q. Then up to the time you left the job the boat never floated of her own buoyancy, she was just held up by the slings, is that right?

A. Yes, sir.

By the Court:

Q. How many of these cargo hatches did you say there were?

A. Four.

Q. Where was the one that was located in the forward part of the boat?

A. What I call the forward part of the boat—the boat looked the same thing at both ends but we call the forward part on one end because there is the higher part, on that [fol. 251] one end and on the other end we call that the stern. The cargo hatches, I would state, some were exactly in the center of the boat.

Q. You said something about being able to go into either cargo tank from these hatches?

A. Yes.

Q. Could you go into different tanks from that hatch, the forward hatch?

A. Yes, sir.

Q. Which two tanks?

A. It would be the forward tanks. The barge was divided into four.

Q. Into four cargo tanks?

A. Yes, one bulkhead running from forward to aft and one right across.

Q. Midships?

A. Yes, and that hatch forward was placed right in the center of the bulkhead so you could go to either side.

Q. Was that true also of the hatch at the stern?

A. Yes;

Q. You say you found only one hatch open?

A. Yes.

Q. Were the midship hatches closed?

A. Yes.

Q. How many were there midship?

A. Two.

Q. How were they located?

A. They were at the side of the boat more, maybe 8 or 9 feet from the side.

Q. And what hatches could you enter from that? What bulkheads did they cover?

A. It crossed the cross bulkhead.

Q. Midships?

A. Yes. Each was half forward and half aft. You could go to either one.

Q. You say they were closed?

A. Yes.

Q. What do you mean by closed?

A. They were closed and we opened them. Like a lid that goes down, there you have screws, what we call the turn-buckles.

Q. And the forward hatches and the two midship hatches were closed?

A. Yes.

Q. And the lugs tightened down?

A. Yes.

Q. Did you observe that?

A. Yes. I opened them.

Q. You opened them yourself?

A. Yes.

Mr. Matteson: I thought he said the first time that the [fol. 252] screws or the lugs, as he called them, were not fastened.

The Witness: Not aft.

The Court: I was coming to that.

By the Court:

Q. Now, what was the condition of the cargo hatch at the stern?

A. The hatch was closed but the lugs was not fastened.

Q. You mean the cover was not down?

A. No.

Q. You said something about these hatches not being level with the deck. Did they stand up?

A. They stand up like a coaming, we call it, like a building up, maybe 18 inches or 2 feet; I don't recollect exactly.

Q. Did you see anything from your observation of the

barge while it was there and as you saw it at the bottom of the slip in the mud that would indicate what caused it to sink?

A. No.

The Court: Anything else?

Mr. Matteson: No, sir.

Mr. Erskine: No, sir.

(Witness excused.)

#### COLLOQUY

The Court: Now, what about that other evidence, that other testimony and computations that I wanted from experts?

Mr. Erskine: Your Honor, I have an affidavit from Mr. Loeser to the effect that all of his memoranda of the measurements of the barge have been destroyed.

The Court: Are you willing that the affidavit go in instead of the testimony of Mr. Loeser?

Mr. Matteson: I am willing to let it go at that with that statement on the record.

The Court: All right; you waive then the production of Mr. Loeser.

Mr. Erskine: Your Honor reminds me that his affidavit [fol. 253] does state that the calibrations were made by him personally from exact measurements and with that calibration I would offer the measurement tables in evidence.

The Court: Can you get Mr. Loeser here to identify these calibration tables and say that he prepared them so that you may mark them as an exhibit instead of having them for identification only?

Mr. Erskine: I thought perhaps I might avoid the necessity of putting him on the stand, bringing him up here for that purpose.

Mr. Matteson: Is his name on them? Probably it is.

Mr. Erskine: Yes, the firm name.

Mr. Matteson: As a matter of fact, I never have seen the calibration tables and never looked at it.

Mr. Erskine: You had them in your hand when you questioned him.

Mr. Matteson: You had them in your hand and I never looked at it.

Mr. Erskine: You questioned Mr. Bagger about them.

Mr. Matteson: You are mistaken.

The Court: What about it? Are you ready to stipulate that if Mr. Loeser was called he would state he prepared the calibration tables from actual measurements made of the barge at the time?

Mr. Matteson: Yes, certainly.

The Court: Measurements made by him?

Mr. Matteson: Yes. This all, of course, is subject to my original objection.

The Court: You mean the objection you made to the taking of any of this additional testimony?

Mr. Matteson: Yes.

Mr. Erskine: On that stipulation, your Honor, I ask that the calibration tables which are marked Exhibit 1 for identification be marked in evidence.

(Marked Petitioner's Exhibit No. 1.)

[fol. 254] Mr. Erskine: As to Captain Jeffcott, your Honor, although we have not the exact measurements the captain points out that his memorandum related to dead weight of displacement and the assumption of an even keel and even trim, so that the length of the inner tanks would make no difference. Accordingly he has worked out in a letter the re-calculation of draft displacement under the weights and quantities set out in your Honor's memorandum, in other words, showing the drift and freeboard with the number of gallons and weight per gallon as stated in your Honor's memorandum.

The Court: Have you shown that to Mr. Matteson?

Mr. Matteson: I have not had an opportunity to check the mathematics but if that is the only question I assume the mathematics are correct.

Mr. Erskine: In fact it is simply the same computation as the witness made at the trial.

Mr. Matteson: It looks all right.

Mr. Erskine: I offer it in evidence.

The Court: All right, subject to an examination of the figures as to their mathematical accuracy that is received.

(Marked Petitioner's Exhibit No. 8.)

Mr. Erskine: As to the surveyor, Mr. Haight, Mr. Haight telephoned me yesterday that he had to be out of his office almost all this week on surveys and he could not give me that computation before next Wednesday. I simply have to ask your Honor to give me that more time to put it in.

The Court: All right. Suppose you show it to Mr. Matteson and then you may stipulate that it be received as an exhibit and Mr. Haight, if called, he would testify to the figures and statements contained therein.

I suppose you make that stipulation with respect to Exhibit 8, that if Captain Jeffcott were called he would testify to the statements and calculations contained in this Exhibit 8?

[fol. 255] Mr. Matteson: Yes.

Mr. Erskine: I think that covers all of the questions directed to me, your Honor.

The Court: Yes. You will have that next Wednesday, which will be on March 8th. Send them to me with a letter, will you please, and we will consider them then when they are received as Exhibit 9, unless there is some objection made.

Does that take care of what you were to supply? That takes care of all of the additional evidence I asked from your side?

Mr. Erskine: I think so; yes.

The Court: Mr. Matteson, there was a paragraph there in relation to the insurance.

Mr. Matteson: Yes, if your Honor please.

The Court: The adjustment of the assurance claim and the insurance policy. Were you able to get any of that information?

Mr. Matteson: I have verified the statement that I made in chambers that the documents are all abroad. We have communicated by cable to see what we could do and we have not heard anything yet.

The Court: Do you think you may have some word by next Wednesday, the 8th?

Mr. Matteson: I would hope so but I just can't tell.

The Court: Then I will hold the matter open until you get a reply and you will send me the information in the form of a letter, of which a copy will go to Mr. Erskine. You may show Mr. Erskine whatever you get from the other side in the way of a reply, either as extracts from the documents or as summaries of the documents or the documents themselves. Whatever you get from your correspondent on the other side exhibit to Mr. Erskine and then you can both agree upon a stipulation that will go in the record and we will call it Exhibit 10.

Mr. Erskine: Shall I keep these exhibits, your Honor,

[fol. 256] and submit them to you at the final hearing or submit them to you now?

The Court: I will keep them here now.

You are leaving the calibration table and the letter here and you will send up to me the photostats of Exhibit 7, the daily log sheets of the diver, and Exhibit 9, Mr. Haight's new figures and calculations will come in on March 8th. Exhibit 10 will be the stipulation as to what Mr. Matteson receives from the other side as to the contents of the insurance policy and the correspondence or the agreement with reference to the adjustment of the insurance claim.

Mr. Erskine: All right, sir.

Mr. Matteson: If your Honor please, may I mark as an exhibit in connection with my objection a notice to produce that was served upon my opponent before trial?

Mr. Erskine: That is the one you served on us?

Mr. Matteson: Yes.

Mr. Erskine: I have no objection.

(Marked Claimant's Exhibit D.)

The Court: All right, gentlemen, if you wish to submit any further memorandum after this comes in, the additional evidence, suppose I fix the time now. You take until the 11th, a week from tomorrow, for a supplemental affidavit just on the additional evidence that was received today and will be coming in in the way of these other figures and records.

Mr. Matteson: If your Honor please, if I don't get Mr. Erskine's figures until next Wednesday that would make it rather difficult.

The Court: What time do you say?

Mr. Matteson: I would like to have a week from the time I get Mr. Erskine's figures.

The Court: The 15th?

Mr. Matteson: Yes.

The Court: All right. Then you have to get your records from abroad. Suppose you have until March 15th for an additional memorandum and an exchange.

[fol. 257]

# PETITIONER'S EXHIBIT 1

## Calibration Table

(Omitted pursuant to stipulation)

## PETITIONER'S EXHIBIT 2

Sparling's Welded Shipbuilding Corporation  
 Designers and Builders of Electric Welded Ships  
 2-12 Astoria Ave., Astoria, Long Island City, N. Y.

June 28, 1937.

New York Tank Barge Inc., 11 West 42nd Street, New York,  
 N. Y., Dr.

To Sparling's Welded Shipbuilding Corp., ~~Astoria~~, Long  
 Island, N. Y.

## Barge No. 73

5/22 Docked and Undocked	\$15.00
Welded leaks in after peak	12.00
Welded 2' nipple in pump manifold	2.00
Welded hole and thin pits in tank bottom	10.00
Removed and replaced broken stud bolt hold- ing dog on capstan	6.00
Bailed out water, cleaned, chipped, and burned limber holes in after peak	83.00
[fol. 258] Ditto in forepeak	83.00
Pumped out after peak	10.00
Renewed and riveted rubber retaining flats on cargo hatch cover	8.00
Welded two patches on deck	11.00
Welded four angle bracers in fore peak	16.00
Renewed flapper valve in hand bilge pump	5.00
Bolts, rubber, rivets	2.00
	<hr/>
	\$263.00

## PETITIONER'S EXHIBIT 3

Plymouth Cordage Co.

Established 1824

North Plymouth, Mass., Sept. 13, 1937.

Order Date: 9/10/37.

Sold to: Barge Vegoil #5 & Owners.

Address: New York Tank Barge Corp., 11 West 42nd St.,  
 New York City.

Sales District No. 2.

Shipped to: Barge Vegoil #5.

Address: % Harbor Tank Storage Co., Guttenburg, N. J.

Shipped Via McCabe's.

Car No. Z 1.

Quantity Shipped	Description	Total Gross Weight	Price	Amount
1—100 fm. coil	5" cir. Plymouth			
	Manila Rope Medium Soft Lay	420	22	92.40
	Less 5% Trade Discount			4.62
				<hr/> 87.78

N. Y. S. O. 20211.

[fol. 259]

PETITIONER'S EXHIBIT 4

November 9, 1937.

Marine Loss Department

Capt. Jeffcott.

New York Tank Barge Company, Barge "T. N. #73" Sinking 1470. Loss Numbers 60013 and 12880.

On November 4th I proceeded to the above barge then on drydock at the Tietjen & Lang Yard, Hoboken, N. J. and obtained measurements of the barge for the purpose of calculating her deadweight carrying capacity.

Length on deck 165 feet. Length on bottom 136 feet. Beam 38 feet. All outside measurements. Depth from top of deck to underside of bottom 8 feet. Rakes at ends begin at a point 23 inches below the deck (assumed two feet).

Light draught, estimated from water marking on the raked end, 20 inches. This may be subject to error.

$165 - 136 = 29$  feet change in length over a depth of 6 feet.

$$\frac{29 \times 12}{72} = 4.83'' \text{ in length per inch depth.}$$

$4.83 \times 20 = 96.6'' = 8$  feet.  $136$  and  $8 = 144$  feet length at L. W. L.

$\frac{72 - 20}{2} = 26''$ —half depth between L. W. L. and two feet below deck.

$4.83 \times 26 = 125.58'' = 10.5$  feet. And  $10.5$  and  $144 = 154.5$  feet.

Mean waterplane area over the raked part of the hull between the light water line and two feet below the deck where the rakes end =  $154.5 \times 38$  feet.

$$\frac{154.5 \times 38}{432} = 13.59 \text{ tons per inch in fresh water, the average [fol. 260] age between 20 inches draught and 72 inches draught. } 13.59 \times 52 = 706.68$$

Long tons capacity in fresh water at 72 inches draught and with 24 inches freeboard.

Assuming 12 inches freeboard there will be in addition to the above.

$$\frac{165 \times 38}{36} = 174 \text{ Long tons in fresh water.}$$

So if the assumed light draught of 20 inches is correct this barge should carry 880.7 Long tons in fresh water with a freeboard of 12 inches.

. . . . .

Taking the Specific Gravity of Molasses at between 1.34 and 1.35 the weight will be 11.2 pounds per U. S. Gallon.

If the barge had 140,000 gallons on board at the time of sinking her load would be:

$$\frac{140,000 \times 11.2}{2240} = 700 \text{ Long tons.}$$

She should have carried this quantity with a freeboard of not under 24 inches.

W. R. Jeffcott.

WRJ:VH.

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[fol. 261]                      PETITIONER'S EXHIBIT 5

Report of survey held on the barge "T. N. 73" dated November 3, 1937.

(Omitted pursuant to stipulation)

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PETITIONER'S EXHIBIT 6

It is this day mutually agreed between the New York Tank Barge Co. Inc. of New York, hereinafter called the barge

owners, with the Dunbar Molasses Corporation of New York, hereinafter called the charterers, that for a period commencing the 1st of February 1929 to the 31st of January, 1934. The said New York Tank Barge Co. Inc., shall carry and the said Dunbar Molasses Corporation undertakes to ship in the said barge owners' barges (barges owned and/or chartered) all of the molasses brought by the charterers, or any of its subsidiaries or affiliated companies, to New York Harbor in steamers and/or molasses bought ex tidewater terminals and/or refineries within New York Harbor lighterage limits, including National Sugar Refinery and Federal Sugar Refinery at Yonkers and connecting waterways, for reshipment in barges to any of the charterers' customers having tidewater terminal receiving facilities located within New York Harbor and connected with inland waterways, whether sold to such customers F. O. B. producing point or F. O. B. point of delivery. The following rates of freight shall apply:

$\frac{3}{4}$ ¢ per gallon for molasses ex steamer lying at anchorage within New York Harbor or originating from any tidewater terminal or sugar refinery (including National Sugar Refinery and Federal Sugar Refinery at Yonkers) within New York lighterage limits for shipment to Mechanicville, N. Y. [fol. 262]  $\frac{3}{8}$ ¢ per gallon for molasses ex steamer lying at anchorage within New York Harbor or originating from any tidewater terminal or sugar refinery (including National Sugar Refinery and Federal Sugar Refinery at Yonkers) within New York lighterage limits for shipment to Newark, N. J.

$\frac{2}{5}$ ¢ per gallon for molasses ex steamer lying at anchorage within New York Harbor or originating from any tidewater terminal or sugar refinery (including National Sugar Refinery and Federal Sugar Refinery at Yonkers) within New York lighterage limits for shipment to Peekskill, N. Y.

$\frac{3}{8}$ ¢ per gallon for molasses ex steamer lying at anchorage within New York Harbor or originating from any tidewater terminal or sugar refinery within New York lighterage limits for shipment to Yonkers, N. Y.

$\frac{1}{4}$ ¢ per gallon for molasses ex steamers lying at anchorage at Peekskill for delivery to Peekskill, N. Y.

\$1,250.00 for approximately 1,500,000 gallons ex steamer lying at anchorage off Baldwin Avenue or Pier k, into your plant at Baldwin Avenue. In the event no barging facilities

are required to unload direct from steamers to charterers or customers tanks, the charterer shall of course be under no obligation to employ barges of the barge owners.

The barge owners undertake and agree that barges owned and/or chartered are tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and will maintain the barges in such condition during the life of this contract. The charterers also undertake and agree to always have all the pumps, pipe lines, other equipment, flexible hoses, etc., used in connection with the loading and discharging of molasses, in good working order, as well as have the cargo tanks and equip- [fol. 263] ment cleaned in a satisfactory condition to receive and handle molasses.

The molasses will be pumped into the barges at the steamers' and/or tidewater stations' expense and pumped out at the expense of the barge owners, consignees supplying steam for the unloading. Towing expenses, harbor and/or canal and/or river dues and any other charges on the barges are to be exclusively for the account of the barge owners.

Barge owners further undertake and agree to tow the barge or barges immediately after loading has been completed without delay to destination or destinations indicated by the charterers.

Charterers will keep the barge owners well informed of their probable requirements as far in advance as possible and will endeavor at all times to give them sufficient time to prepare for the efficient and expeditious handling of cargoes, and barge owners in turn agree to have ready and supply sufficient tank barges of no greater than nine feet loaded draft to meet the reasonable requirements of the charterers.

It is agreed that the Dunbar Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co. Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc. and/or the owners of such barges; and that neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected.

The barge owners will not demand or attempt to collect any demurrage for the detention of any of its barges unless there be undue delay or interruption in the loading or discharge for which the barge or barges are not responsible, or

unless barge or barges are not given ready berth upon arrival; and in such event demurrage shall be at the rate of \$100.00 per day, fractions in proportion.

[fol. 264] Freight to be paid in New York up to fifty (50) per cent of the estimated gallonage loaded on the barges on each trip when barges are loaded and ready to proceed to destination; balance upon receipt of customs' outturn gauge, except when owing to special unloading and receiving conditions adjustments on customs' outturn gauge are not made by the charterers.

#### Force Majeure

It is understood and agreed that neither party to this contract shall be held responsible for delays or losses arising out of causes commonly termed as Acts of God; restraints of rulers and princes, or other causes not within the control of either party; but each party to use all diligence to remove such causes and continue performance as soon thereafter as possible.

Dated October 11, 1928

Dunbar Molasses Corporation, Irwin Stern, Treas.

Accepted:

New York Tank Barge Co. Inc., M. H. Baldwin, Jr.,  
President.

New York,

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#### PETITIONER'S EXHIBIT 7

Log sheets

(Omitted pursuant to stipulation.)

[fol. 265]

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#### PETITIONER'S EXHIBIT 8

New York, March 2, 1939

Tank Barge "T. N. No. 73"

Mr. Robert S. Erskine,

Kirlin, Campbell, Hickox, Keating & McGrann,  
120 Broadway, New York City.

DEAR MR. ERSKINE:

The inside measurements of tanks of the above barge will have no bearing on the mean draught or freeboard with any

given weight on board though the distribution of this weight in different tanks would affect the trim of the barge.

On the assumption that this barge had on board at the time of the accident a total cargo of 156,607 gallons of molasses and that this molasses weighed 11.9 pounds per gallon, and further assuming 20 inches as the light draught of the barge and that this cargo was distributed so as to trim the barge evenly fore and aft.

(All Tons Are 2240 Pounds)

$$\begin{array}{rcl} 156,607 \times 11.9 & = & 831.97 \text{ Tons.} \\ \hline & & 2240 \end{array}$$

Between 20 inches draught and 72 inches draught the mean waterline length of the barge is 154.5 feet and the beam is 38 feet.

$$\begin{array}{rcl} 154.5 \times 38 & = & 13.59 \text{ Tons per inch} \\ \hline & & 432 \end{array} \quad \begin{array}{l} \text{immersion in fresh water.} \end{array}$$

$$\begin{array}{rcl} 154.5 \times 38 & = & 13.9785 \text{ Tons per inch} \\ \hline & & 420 \end{array} \quad \begin{array}{l} \text{immersion in sea water.} \end{array}$$

[fol. 266]

$$\begin{array}{rcl} 13.59 \times 52 & = & 706.68 \text{ Tons deadweight} \\ & & \text{required to immerse} \\ & & \text{from 20 to 72 inches} \\ & & \text{draught in fresh water.} \\ 14. \times 52 & = & 728 \text{ Tons deadweight from 20 to} \\ & & \text{72 inches in sea water.} \end{array}$$

At 72 inches above the bottom the rake ends and from 72 inches up to the deck at 96 inches above the bottom the waterline length will be 165 feet.

$$\begin{array}{rcl} 165 \times 38 & = & 14.5 \text{ Tons per inch immersion in} \\ \hline & & 432 \end{array} \quad \begin{array}{l} \text{fresh water.} \end{array}$$

$$\begin{array}{rcl} 165 \times 32 & = & 14.93 \text{ Tons per inch immersion in} \\ \hline & & 420 \end{array} \quad \begin{array}{l} \text{sea water.} \end{array}$$

In fresh water the barge will carry 706.68 Tons at 72 inches draught and in sea water 728 Tons at the same draught.

831.97 minus 706.68 = 125.29 Tons to be loaded above the  
72 inch draught in fresh water.

831.97 minus 728 = 103.97 Tons over the 72 inch draught  
in sea water.

125.29 = 8.6 inches plus 72 inches = 80.6 inches, the  
draught with the above cargo on board in fresh  
14.5 water. Freeboard 15.4 inches.

103.97 = 6.9 inches plus 72 inches = 78.9 inches, the  
draught in sea water and the corresponding free-  
14.93 board is 17.1 inches.

Yours very truly,

(Sgd.) W. R. Jeffcott.

WRJ:KS

[fol. 267]

PETITIONER'S EXHIBIT 9

Robert S. Haight

Consulting Engineer

Ship and Engineer Surveyor

90 West Street

Cable Address "Shipeng" New York.

Telephone REctor, 2-0472.

New York, March 13, 1939.

Messrs. Girlin, Campbell, Hickox, Keating & McGrann, 120  
Broadway, New York City.

New York Tank Barge 73 sinking at Hoboken, N. J.

DEAR SIR:

In compliance with Mr. Erskine's letter of February 27th I have made some further calculations regarding the trim of New York Tank Barge 73, as desired by Judge Leibell.

(1)—How many gallons of molasses weighing 11.9 pounds per gallon in the forward tanks would bring the bow down to 23 inches of freeboard?

Answer—56,500 gallons.

(2)—How many gallons of molasses in the after cargo tanks would bring the barge down to a freeboard of 14 inches all around?

Answer—With only the amount of molasses stated in an-

swer (1) in the forward tanks it is not possible to bring the barge down to a freeboard of 14 inches all around.

If we add 42,200 gallons in the after tanks, the barge will come to an even keel and will be floating at 3 feet-two and one-half inches freeboard.

[fol. 268] It is necessary to add a further 66,300 gallons, distributed in the forward and after tanks, in proportion to their length, in order to bring the barge down to 14 inches of freeboard all around, with 165,000 gallons then on board.

(3)—How many gallons of molasses in the after tanks will bring the stern down flush with the water?

I understand you to mean commencing with the condition developed in answer to question (1).

Answer—81,000 gallons, making a total on board of 137,500.

Note: Regarding my assumption as to the correctness of Captain Jeffcott's figures, I venture to point out that I made use of none of his figures or calculations excepting only the dimensions of the barge. Furthermore, the specific gravity of 11.9 which I am now asked to assume in no way changes the results which I testified to last fall, because my results were all stated in tons and unless asked to convert tons into gallons the specific gravity of the commodity does not enter into the calculation.

Further as to the query regarding 156,607 gallons on board at the time of the accident, I can only point out that the results already testified to by me in tons approximate very closely 150,000 gallons at 11.9 pounds per gallon, with the barge floating freely, her stern deck just awash, and 160,000 gallons with the extra 60 tons added about which I testified.

Yours very truly, R. S. Haight.

RSH:EM.

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[fol. 269] STIPULATION AS TO PETITIONER'S EXHIBIT 10

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of The Petition of NEW YORK TANK BARGE CORPORATION, as Chartered Owner of the Tank Barge "No. 73", for Exoneration from or Limitation of Liability, Petitioner-Appellee,

COMMERCIAL MOLASSES CORPORATION, Claimant-Appellant

## EXHIBIT 10

Pertinent portions of insurance policy of The Yang-tsze Insurance Association, Ltd., which policy was one of several similar policies applicable to the shipment in question:

"Touching the Adventures and Perils which the said Yang-tsze Insurance Association, Limited, are content to bear, and to take upon them in this Voyage: they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons; Letters of Mart and Counter Mart, Surprisals, Taking at Sea, Arrests, Restraints, and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever; Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises, and Ship, &c., or any part thereof; and in case of any Loss or Misfortune, it shall [fol. 270] be lawful for the assured, his or their Factors, Servants, or Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, &c., or any part thereof, without prejudice to this Insurance; to the Charges whereof the said Yang-tsze Insurance Association, Limited, will contribute."

## Institute Clauses

"1. This insurance attaches from the time the goods leave the Warehouse and/or Store at the place named in the policy for the commencement of the transit and continues during the ordinary course of transit, including customary transshipment if any, until the goods are discharged overseas from the overseas vessel at the final port. Thereafter the insurance continues whilst the goods are in transit and/or awaiting transit until delivered to final warehouse at the destination named in the policy or until the expiry of 15 days (or 30 days if the destination to which the goods are insured is outside the limits of the port) whichever shall first occur. The time limits referred to above to be reckoned from midnight of the day on which the discharge overseas of the goods hereby insured from the overseas vessel is completed. Held covered at a premium to be arranged in the event of transshipment, if any, other than as above and/or in the event of delay in excess of the above

time limits arising from circumstances beyond the control of the assured.

2. Including transit by craft, raft and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a separate insurance. The assured are not to be prejudiced by any agreement exempting lightermen from liability.

7. The assured are not to be prejudiced by the presence of the negligence clause and/or latent defect clause in the [fol. 271] Bills of Lading and/or Charter Party. The seaworthiness of the vessel as between the assured and the Underwriters is hereby admitted and the wrongful act or misconduct of the shipowner or his servants causing a loss is not to defeat the recovery by an innocent assured if the loss in the absence of such wrongful act or misconduct would have been a loss recoverable on the policy. With leave to sail with or without pilot<sup>s</sup>, and to tow and assist vessels or craft in all situations, and to be towed.

8. Warranted free from liability for loss or damage to the goods whilst in the custody or care of any carrier or other bailee who may be liable for such loss or damage but only to the extent of such carrier's or bailee's liability."

It is stipulated and agreed that the original policy of The Yang-tsze Insurance Association, Ltd., and the original policies of The Merchants' Marine Insurance Co., Ltd., Sea Insurance Co., Ltd., Sun Insurance Office, Ltd., The World Auxiliary Insurance Corporation, Ltd., The Corporation of the Royal Exchange Assurance, The State Assurance Co., Ltd., The New Zealand Insurance Co., Ltd., Ellerman's Wilson Line, Ltd. and Morison, Pollexfen & Blair, Ltd., and The Hull Underwriters' Association, Ltd., all of which were submitted to the District Court as comprising Exhibit 10 may be produced and referred to on appeal by counsel for either party with the same force and effect as if the same were printed in full in this record.

Dated, New York, N. Y., February —, 1940.

Bigham, Englar, Jones & Houston, Proctors for  
Claimant-Appellant. Kirlin, Campbell, Hickox,  
Keating & McGrann, Proctors for Petitioner-Appellee.

[fol. 272]

CLAIMANT'S EXHIBIT A

Pencil diagram drawn by witness J. J. Tighe

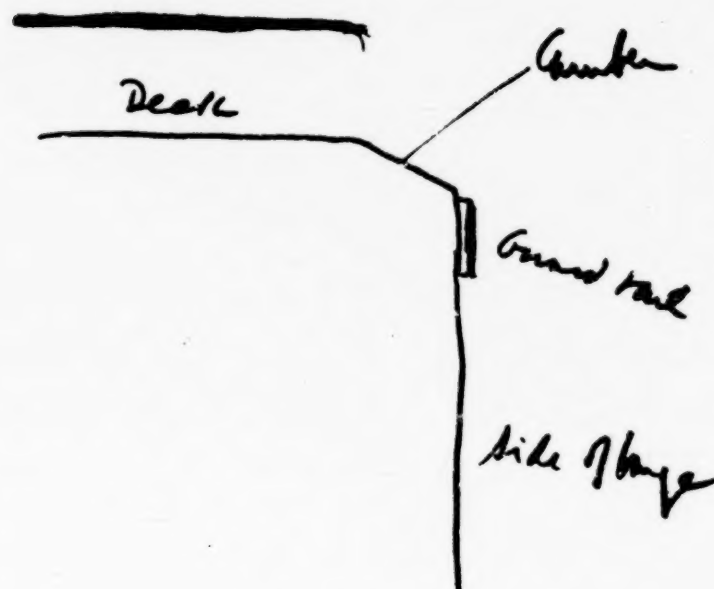
(Photoprint)

[For the Convenience of Court and Counsel this Exhibit  
(Photostatic Copy) is Bound in on the Following Page]

(Here follows 1 photolithograph, side folio 273)



Claimant's Exhibit A.



*Gift - Title*

EXHIBIT A  
U. S. Dist. Court  
S. D. of N. Y.  
OCT 27 1938  
A 117-95

[fol. 274]

## CLAIMANT'S EXHIBIT B

M. S. "Athelsultan"

Pier 1, Hoboken, N. J.,

October 27, 1937.

Statement By: H. L. Jones, 3rd Officer, M. S. "Athelsultan".

Re: Barge "NG 73"—Sinking of—October 24, 1937.

My name is H. L. Jones, 7 Frankby Ave., Wallasey, Cheshire, England.

I have served as third officer of the M. S. "Athelsultan" for two and one-half years.

On the night of October 23rd and the early morning of Oct. 24, 1937, I was on deck duty aboard the vessel and during its discharge of molasses cargo into the tank barge "Navegadora 73" which was lying along the starboard side of the vessel, outboard.

The tank barge "Navegadora 73" was made fast to the M. S. Athelsultan by its own lines and controlled from the deck of the barge.

At about 9:05 p. m. on Oct. 23rd we started pumping into the tank barge. We used one length of our own flexible hose from the ship's pipeline connection to overside where it was made fast to the hose from the barge. We used our own pumps.

The tank barge captain controlled his own valves and gave us signals for starting the pumps and stopping them.

At about 12:55 a. m. on Oct. 24th 1937, I looked overside to the barge to see how she was progressing. By this I mean that I looked at her freeboard. She was out about a foot from the ship and on about even keel with no list. I didn't notice the barges mooring lines. However, everything looked alright to me. I didn't see the barge captain or anyone else on deck of the barge; I had seen him on the deck of the barge about an hour previously. I noted that the barge had a little freeboard left.

[fol. 275] According to our custom, the barge captain shouts out aboard fifteen minutes before hand to "stand-by". I remained on deck at all times so as to be immediately available to stop the pumps when word came from the barge to do so. I was not watching the barge particularly after 12:55 a. m. as there was no reason to on my part as we take orders from the barge captain.

At about 1:10 I heard a commotion. I was standing on the port side of the ship at the time and I then looked over to the starboard side and saw the barge captain standing on the bulwark rail. As I got over to the starboard side, the second man from the barge appeared over the bulwark rail.

The bow of the barge had come up higher than the bulwark rail; this rail was about 14' above the water's edge. The 2nd man climbed aboard from the bow of the barge. These men made no statement at all.

In-so-far as I know, all of the barge's tank lids were closed except the forward one. The stem of the barge was way under water. The stem lines had carried away. The bow lines and the pipeline were holding fast. The stern gradually drifted out to the middle of the slip. The pipeline hose connections then snapped. Then the bow lines parted. Shortly thereafter the barge sank, at 6 a. m. The barge crew remained on the "Athelsultan"—nobody went back aboard the barge at any time.

I have no idea as to what caused the barge to sink.

We figured that we were pumping at about the rate 40,000 gal. per hour.

H. L. Jones, 3rd Officer.

[fol. 276]

## CLAIMANT'S EXHIBIT C

## Partial Final Liquidation Invoice

Commercial Molasses Corporation, 24th November, 1937.  
 230, Park Avenue, New York. C/D 14.1.37.

Bought of

The United Molasses Company Ltd.

Bush House . Aldwych  
 London . W.C.2

For settlement in accordance with contract.

m. v. "Athelsultan"

To A cargo of Final Javan Molasses commercially designated as Blackstrap, per the above vessel, arrived New York, 23rd October, 1937.

Discharged at	Lbs. of molasses	Mean analysis	Lbs. of sugar
Weehawken	20,431,492	55.95	11,430,398
Albany, Tank No. 3	7,131,752	55.77	3,970,603
Albany, Steamings	206,120	54.23	112,129
	27,769,364	55.86418	15,513,130

➤ Equals 12,397.037 long tons of Molasses.

15,513,130 lbs. of sugar @ 75 cents per 100 lbs.  
 of sugar \$116,348.48

[fol. 277] This partial liquidation is subject to final settlement later in accordance with the terms of our exchange agreement dated 14th January, 1937.

Sellers reserve right to debit Buyers with balance of cargo (lost by sinking of Barge TN. 73) if Sellers eventually are unable to collect from Underwriters on Buyers' behalf.

E.&amp;O.E.

JA/EMH.

## Final Invoice

Commercial Molasses Corporation, 24th November, 1937.  
230, Park Avenue, New York. C/D 14.1.37.

Bought of

The United Molasses Company Ltd.

Bush House . Aldwych

London . W.C.2

Net cash for any balance due.

m. v. "Athelsultan"

To Freight Differential payable to us on a cargo of Javan Molasses commercially designated as Blackstrap, per the above vessel which arrived New York, 23rd October, 1937.

[fol. 278]

12,397.037 long tons, less 1.830 long tons being  
adjustment for steamings = 12,395.207 long  
tons @ \$1.50 per long ton ..... \$18,592.81

Sellers reserve right to debit Buyers with balance of cargo (lost by sinking of Barge TN. 73) if Sellers eventually are unable to collect from Underwriters on Buyers' behalf.

E.&O.E.

JA/EMH.

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CLAIMANT'S EXHIBIT D

Notice to Produce

(Omitted pursuant to stipulation)

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[fol. 279] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF LEIBELL, D. J.—February 24, 1939

I have reread the minutes in this case, examined the exhibits, analysed the briefs, considered the arguments and read the cases cited. I find that quite some space in the

briefs of the petitioner is given over to proof and argument that the after cargo tanks were overloaded. Claimant devotes many pages in an attempt to show that there is no definite proof from which any well-founded conclusion could be drawn on the issue of overloading. It seems to me that on that point we should have additional proof.

A. Testimony of the member of Gebauhr & Loeser who prepared the calibration tables: These tables have been marked only for identification and are not yet in evidence. Mr. Baldwin, president of petitioner, testified that he found them accurate so far as gallon capacity, but the additional testimony suggested will, if available, clearly establish the reliability of these tables and make possible their admission as an exhibit.

B. Testimony showing the exact dimensions of the four cargo tanks and the two peak tanks: Mr. Baldwin's testimony was from memory. It may be that Gebauhr & Loeser have these dimensions. They probably had them at the time the calibration tables were prepared.

C. Additional expert testimony: I think we should have further testimony from the experts, Robert S. Haight and Captain Jeffcott.

Mr. Haight assumed the correctness of many of the figures to which Captain Jeffcott testified, which are contained in Captain Jeffcott's report (Exhibit 4). The report as-  
[fol. 280] sumes that the weight of the molasses was 11.2 pounds per gallon.

I should like to have both Captain Jeffcott and Mr. Haight submit new reports based upon the correct dimensions of the cargo tanks and the peak tanks and assuming the total cargo aboard the barge at the time of the accident was 156,607 gallons and that the molasses weighed 11.9 pounds per gallon.

I should like Mr. Haight in particular to figure (1) the number of gallons of molasses weighing 11.9 pounds per gallon in the forward tanks that would bring the bow of the barge down to 23 inches of freeboard across the bow and (2) the number of gallons of molasses in the after cargo tanks that would bring the barge down to a freeboard of 14 inches all around; and (3) the number of gallons of molasses in the after tanks that would bring the stern down flush with the water.

C. Testimony of the salvors: (1) On the question as to which hatch covers were open and which were dogged down, I think we should have the testimony of the divers who examined the barge before it was raised. (2) These divers may be able to testify whether they observed any molasses leaking from any part of the hull; and (3) whether there was any molasses in the after peak tank when it was first opened. (4) There probably are reports in existence which will indicate the conditions that the divers observed when they examined the hull and the steps that were taken to raise the barge.

Neither side called any representative of the Merritt-Chapman Company, the salvors. I request that they be called and that they produce all their records in relation to this salvage job.

D. Testimony as to the adjustment of the insurance claim: (1) The insurance policy should be put in evidence. (2) [fol. 281] Any correspondence or agreement showing the arrangement between the insurance company and the claimant for the adjustment of its claim against the insurance company and for the filing of a claim against the petitioner in this proceeding.

For the taking of this additional testimony the Court will fix a date to suit the convenience of counsel but suggests that it be done Friday, March 3d, 1939 at 2:00 P. M. in Room 318 of the Court House.

Dated, February 24, 1939.

Vincent L. Leibell, United States District Judge.

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#### IN UNITED STATES DISTRICT COURT

OPINION OF LEIBELL, D. J.—April 26, 1939

Kirlin, Campbell, Hickox, Keating & McGrann, Esqs.,  
Proctors for Petitioner, 120 Broadway, New York City.  
(Robert S. Erskine, Esq., Advocate.)

Bigham, Englar, Jones & Houston, Esqs., Proctors for  
Claimant, 99 John Street, New York City. (Leonard J.  
Matteson, Esq., and Charles A. Van Hagen, Jr., Esq., Advoca-  
tes.)

LEIBELL, D. J.:

This is a proceeding brought by the New York Tank Barge Corporation, as chartered owner of the tank barge

"No. 73" for exoneration from or limitation of liability for all claims arising out of the sinking of the "T. N. No. 73" [fol. 282] on October 24, 1937, at Pier 1, Hoboken, New Jersey. The only claim filed in the proceeding was by the Commercial Molasses Corporation for the loss of 165,042 gallons of molasses valued at \$13,000. Petitioner filed due objection to this claim.

The "T. N. No. 73" was built some time during the period of 1916 to 1920 for use in the Mexican oil trade. It was purchased by the Manhattan Tank Barge Company late in the year 1924 and brought to New York in April 1925. Petitioner chartered it from the Manhattan Tank Barge Company in July 1926, on a bare boat basis, only the insurance on the barge being paid by the owner, all wages, equipment and accessories being provided by petitioner. Charter hire was paid on a monthly basis. This charter was in effect at the time the barge sank.

The "T. N. No. 73" was a single skin steel tank barge with the following outside dimensions according to a survey made in dry dock; length on deck 165 feet; length on bottom 136 feet; beam 38 feet; depth 8 feet. The rake at each end began at a point 23 inches below the deck. According to the testimony of petitioner's president, Capt. Baldwin, given from memory, the cargo space was approximately 130 feet in length, 38 feet wide and 8 feet deep. Two bulkheads, one running fore and aft, and the other thwartships, divided the cargo space into two forward tanks each approximately 72' x 19' x 8' and two after tanks each approximately 58' x 19' x 8'. There were also two peak tanks, one forward and one aft. They were 38 feet in beam, less than 8 feet deep and about 15 feet in length at the deck. However, calibration tables prepared when the barge was brought to New York in 1925 indicate that Capt. Baldwin's figures are inaccurate in respect to the ratio of the carrying capacity of the forward and after tanks, the correct ratio being as 7 to 5. There was no evidence as to the length of the peak tanks at the bottom. At either end of the barge there were fenders of wooden planks extending down about 23 inches from the [fol. 283] deck. Right at the base of the fenders a rake began and extended to the bottom of the barge. The rakes accounted for the variation in the longitudinal dimensions of the barge as taken on deck and at the bottom.

The barge was used for the carriage of molasses and vegetable oils in and about New York Harbor. Petitioner,

on numerous occasions, had thus carried molasses for the claimant. Such carriage of molasses was arranged pursuant to the terms of a contract or charter party dated October 11, 1928, between petitioner and the Dunbar Molasses Corporation. It was stipulated in Court that said contract had been assumed by the claimant, which was doing the business formerly done by the Dunbar Molasses Corporation, and that the carriage in the instant case was to be performed under the terms of said contract.

On October 23rd, 1937, the M/S "Athelsultan" was unloading a cargo of molasses, consigned to the claimant, into barges belonging to petitioner for carriage from Pier 1, Hoboken, New Jersey, where the "Athelsultan" was moored, to claimant's plant at Baldwin Avenue, Weehawken, New Jersey. The molasses had been purchased by the claimant from United Molasses, Ltd. of London, England, and was to be delivered by the latter C. I. F. at a United States port into shore tanks or barges provided by the purchaser. Some time between 8:30 and 9:00 P. M. of the evening of October 23rd, 1937, the "T. N. No. 73" was brought alongside of the "Athelsultan" and made fast with its port side to the ship. Four lines ran from the ship to the barge. The two forward lines were attached to the port bow corner and center bitt of the barge, and the two after lines were attached to the port corner and the starboard corner at the stern of the barge. They were five inch lines, three of them brand new and the fourth just a few days old. The discharge hose of the "Athelsultan" was coupled to the receiving equipment of the barge at about midships. The ship began pumping the molasses at 9:05 P. M.

There were, at that time, two men in charge of the "T. N. [fol. 284] No. 73", the captain, John Tighe, and the mate, Lester Head. Both were competent and experienced men and had been working for petitioner for a number of years. They opened the valves on the forward tanks and started to load them. The customary procedure in loading molasses in this barge was to load the forward tanks until the bow came down to the bottom of the bow fender, which made a freeboard of 23 inches at the bow. The valves leading to the after tanks would then be opened and the forward valves closed and the loading continued until the stern came down to within two inches of the guard rail at the side of the barge. The guard rail extended 12 inches below the deck. The barge men would then open the forward valves and

close the after valves and reload the forward tanks until the barge was trim. A freeboard of about 14 inches all around, was the limit of the load. The officers of petitioner instructed the men to load the barges carrying molasses to such a freeboard and it had proven satisfactory with the "T. N. No. 73" and similar barges.

After they commenced to load the forward tanks of the "T. N. No. 73" on the night of October 23rd, 1937, the captain, seeing that everything was running smoothly, went to his cabin. This was about 9:30 P. M. The cabin was located aft of midships. He smoked a cigarette and talked to a friend for a while. The friend left and he went to bed and in about half an hour dozed off.

Meanwhile, the mate let the forward tank fill until the base of the bow fender was level with the water and then closed the forward valves and began loading the after tanks. He testified that this change was made somewhere around eleven or eleven-thirty. The mate also testified that he looked into the after end of the forward tank before he shut off the forward valves and the molasses was then between the second and third steps from the bottom of the ladder at the cross bulkhead. This was said to be approximately one-half the capacity of the forward tanks.

After the valves connected to the stern tanks were opened, [fol. 285] the loading of those tanks proceeded without incident. Some time before 1:00 A. M. in the morning of October 24th, the mate was at the bow of the barge talking to the third officer of the ship and a customs' sampler who were aboard the ship. The mate left and went into the cabin, fixed the fires and went out again. He walked up to the bow, looked around, and then went back to the stern of the barge to examine the freeboard. He testified that the stern was then down to within three inches of the guard rail. He decided that it was nearly time to shut off the valves to the after tanks and complete the loading in the forward tanks. He walked up towards the bow and again carried on a conversation with the two men on the ship. They left and the mate went over to the forward valves in order to open them, preparatory to closing the after valves. As he opened the port forward valve he felt the stern of the barge suddenly settle. This occurred about 1:05 A. M. Almost immediately thereafter there was a decided drop at the stern. The mate went back and seeing that all the stern was under water, started to call the captain.

Meanwhile, the captain was awakened by the splash of water. He jumped out of the bunk and landed in water. When he got near the door of the cabin he met the mate coming to call him. As he got out of the cabin he was up to his chest in water. They walked to the dry part of the barge and then the captain asked the mate what valves he had open. The mate said the after valves were open. The captain told him to close them and as the mate went over to close them there was a sudden lurch down, a second drop or slump of the stern, so that about half the barge, including the after valves, became submerged. The captain called the mate back and they left the barge, going aboard the ship. It was then about 1:07 or 1:10 A. M.

When the captain turned in that night, the after hatch, located right aft of the cabin, was not dogged down. According to the barge crew the side hatches, located on top [fol. 286] of thwartships bulkhead were open as is customary while loading, so that the tanks could be quickly examined. The diver's testimony, given when the trial of the case was reopened at the direction of the Court, was that the side hatches were closed.

Although the "T. N. No. 73" had the equipment requisite for receiving and discharging cargo she did not have the necessary power for pumping and steam had to be supplied from some outside source. On the morning in question, after she had been partly submerged, there was nothing that could have been done by the barge crew to unload any of the cargo. When the captain went aboard the "Athel-sultan" he asked the ship's officers if the ship's pump could be reversed and some of the molasses sucked back into the ship from the barge. He was informed that this was not possible. The ship's pump was stopped so that no more molasses was loaded into the barge.

While the barge was being loaded it was necessary, at various intervals, to slacken the lines holding the barge fast to the ship. The mate testified that he had slackened them several times during the loading, the last time a short while before the barge sank. However, he also stated that he had not looked at the lines at the time he last examined the freeboard at the stern. He said that he had leaned over the rail from midships and looked back at the guard rail towards the stern in making that examination and did not think of the lines at all. After the stern of the barge sank under water, the barge hung on the bow lines and the dis-

charge hose, until about 6 A. M. in the morning of October 24th when they gave way and the barge went to the bottom.

Salvors were engaged by petitioners to raise the barge. After pumping out most of the molasses (only a small amount of it was salvaged) they succeeded in raising the barge and towing her to dry-dock. A survey was made and it was decided that it would be useless to attempt to repair the barge. She was auctioned and sold for scrap. The [fol. 287] salvors' fees totalled about \$5,500, whereas the amount realized at the sale was only \$800.

No one who was in any way connected with the salvaging operations had been called as a witness on the trial of these proceedings. In the hope that such testimony might throw some additional light on the cause of the sinking I filed a memorandum dated February 24, 1939, requesting, among other things, that the diver who had examined the barge while she was on the bottom be called. Accordingly, his testimony was taken on March 3, 1939. He stated that he found the barge lying about two-thirds submerged in the mud and canted over on one side at an angle of about 45 degrees. He could see no evidence of leakage. All the hatch covers were dogged down with the exception of the after cargo hatch. He opened two cargo hatches and put in suction hose and some of the molasses was pumped out. He put wire slings around the barge and with the aid of two derricks she was raised to the surface, i. e., until the deck was level with the surface of the water and then towed to dry-dock. He stated that he saw nothing to indicate what caused the barge to sink.

When the barge was raised it was found that the cabin had shifted, the deck had sagged in ~~at~~ the after end, and the plates at the turn of the bilge on the ~~port~~<sup>port</sup> and starboard side of the cargo tanks forward were deeply indented. These indentations were caused by wire slings placed around the barge by the salvors and used to raise her.

While the barge was in dry-dock she was examined by several marine surveyors on behalf of petitioner, the underwriters and the cargo interests. None of them could definitely ascertain what caused the barge to sink.

One of the marine surveyors employed by the claimant to inspect the barge in dry-dock testified that he found evidence that a considerable quantity of molasses had gotten into the after peak tank. He felt that this might [fol 288] have been a cause of sinking. There was testi-

mony to the effect that the hatch covers of the peak tanks were always kept closed and dogged down. The assistant superintendent of the petitioner testified that he, along with a representative of the cargo interests, examined the barge at noon time of October 23rd, on the day loading started, that they examined the cargo tanks and they appeared dry and clean, although sticky with a coating of molasses. He also opened the hatches on the peak tanks and looked into them. They appeared to be all right and so the hatch covers were replaced and dogged down. The diver testified that the peak tank hatch covers were closed when he descended to the barge.

Apparently, there are only two possible ways in which molasses could have gotten into the after peak tank—through the bulkhead between the after cargo tanks and the peak tank, or through the hatch cover of the peak tank. All those who examined the barge after it was raised were in agreement that the bulkhead appeared to be tight and staunch. Had there been any break in the bulkhead or substantial leakage through it, that should have been apparent to those making the inspection after the barge was raised. It may be that the after peak hatch cover was removed by the salvors and that the molasses got into the after peak hatch while they were pumping it out of the cargo tanks to facilitate the salvaging operations. Nothing from the diver's testimony would indicate that he had opened any of the peak tank hatches. It may have been done after the barge had been raised, but before it was towed to dry-dock. From the record it is impossible to determine how or when the molasses got into the after peak tank, or how much got in. There were some witnesses who saw the barge as it was brought to the surface but they could do little more than describe its general appearance. The barge was in such a battered condition after the salvage operations, that the inspections later made in dry-dock were necessarily inclusive. All that could be said [fol. 289] of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected.

On May 22, 1937, the barge had been inspected by the Insurance Company of North America; certain repairs were suggested by the insurance company; the barge was dry-docked in May 1937 and all necessary repairs were made. Under ordinary circumstances it would not be necessary

to dry-dock the barge again prior to the time of the accident. *American Sugar Refining Co. v. The Sandfield*, 79 Fed. 371. The barge was painted every year or two, depending on the condition of the ice in the previous winter, and was properly chipped before painting. A cargo of molasses had been carried by the barge just a few days prior to October 23rd without mishap. Nothing had occurred in the interval to damage her. Before the loading commenced an examination was made by a representative of the cargo interests and he pronounced her clean and fit for loading. At the same time an inspection was made by petitioner's assistant superintendent. He found the barge all right, absolutely tight, no leaks. The examination consisted of looking into the tanks through the hatches. The cargo tanks were then covered with a skin of molasses. The peak tanks were examined and the peach hatches were dogged down after that. The captain of the barge stated that he had examined her each day for several days prior to the loading and had found nothing wrong. There was no proof of any structural defects in the barge prior to the sinking which would render her unseaworthy.

Molasses is a heavy, viscous cargo, with a tendency to shift or "creep". The barge was fitted with wash plates extending upwards from the bottom of the cargo tanks to minimize this tendency. It was also fitted with equalizers between port and starboard tanks. Because the specific gravity of molasses is quite a bit more than that of water [fol. 290] the "T. N. No. 73" had to carry it in slack tanks, that is, the level of the molasses was three or more feet from the top of the cargo tanks, when the barge was loaded to the usual freeboard of fourteen inches. Although such a situation was not the best possible, and would require care in handling, I do not think that the necessity of carriage in slack tanks would warrant a finding that the "T. N. No. 73" was not fit for the carriage of molasses.

When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 51 F. (2d) 494. Petitioner alleges that the sinking was caused by the negligence of the mate in overloading the after tanks of the barge. I do not find the evidence sufficient to establish this as a fact.

Taking into consideration the amount of molasses shipped and the amount unloaded at Weehawken and Albany, I find

that there were approximately 156,607 gallons (at 11.9 pounds per gallon) pumped into the "T. N. No. 73" between 9:05 P. M. and 1:10 A. M. Due allowance is made for wastage in these computations. They seem to be further borne out by the statement of H. L. Jones, third officer of the "Athelsultan", that the ship was pumping at a rate of approximately 40,000 gallons an hour.

I find that the rate of loading was, on the average, about constant. The molasses was heated to an even temperature by means of steam coils in the holds of the ship and the ship's pump apparently discharged at a constant rate of flow.

Reasonably exact statements of the times when pumping started and was stopped have been given, 9:05 P. M. and 1:10 A. M. respectively. However, the most important element, the time of the changeover from the forward to the after tanks, is stated to have been sometime between 11 and 11:30 P. M. The barge was said to have a normal capacity of 160,000 to 175,000 gallons. Based on the calibration [fol. 291] tables for the volume capacity of the four cargo tanks, I find that the volume capacity of the forward tanks, in relation to the after tanks, may be put at a ratio of 7 to 5. The tables are more reliable than Capt. Baklwin's unassisted recollection of the size of the tanks. With the molasses being pumped into the barge at a rate close to 40,000 gallons per hour, the time of the changeover from the forward to the after tanks is most important. On the mate's testimony, which is the only testimony on this point, we have a spread of half an hour.

The decision on the issue of whether or not the mate was negligent in loading the after cargo tanks of the barge, requires definite proof of the quantity of molasses in the various tanks when the mate was about to shut off the after tank valves and begin reloading the forward tanks. That was the time he felt a heavy jar, followed by the first slump at the stern. Apparently this took place about 1:05 A. M., October 24th. The loading of the forward tanks had started at 9:05 P. M. October 23rd; the ship's pumps were stopped soon after the accident at about 1:10 A. M. The captain of the barge and his mate climbed aboard the ship about 1:37 A. M.

Between 9:05 P. M. and 1:10 A. M. 156,607 gallons of molasses weighing 1,863,635 pounds (1 gallon = 11.9 pounds) or approximately 832 long tons had been dis-

charged into the barge "No. 73" in four hours and five minutes. There is no way of determining what part of this total went into the forward tanks and what part into the after tanks. If we attempt to approach the solution by figuring the number of gallons or tons pumped per minute, there is nothing to show even approximately the number of minutes the molasses was pumped in the respective tanks, because the time when the valves of the forward tanks were shut off and the pumping diverted to the after tanks is not definitely fixed. The mate could not fix that time any more definitely than to state: "I should judge around, somewhere around eleven or eleven thirty".

[fol. 292] A spread of thirty minutes measured in gallons would be 19,170 gallons; in pounds, 228,123; in long tons, about 101.8. The spread of thirty minutes represents about one-eighth of the load. Whether it was in the forward tanks or the after tanks, or partly in one and partly in the other, is of vital importance, but on the present record just how it was distributed is a matter of speculation only.

Petitioner produced, at the trial, certain experts who endeavored to figure the disposition of the load as between the forward and after tanks, at the time the barge sank. After an examination of their computations I was of the opinion that their estimates and conclusions were not well founded and could not form a satisfactory basis for determining whether at the time of the accident the after tanks had been overloaded, through the negligence of the mate of the barge.

Accordingly, in my memorandum of February 24th I requested that the experts submit additional computations. They have done so. One of the estimates, Captain Jeffcott's (Ex. 8) sets forth the capacity of the barge as a unit. However, the important elements in this proceeding are the trim of the barge and the amount of molasses that went into the after tanks. The other computations, Captain Haight's (Ex. 9), show that 56,500 gallons of molasses weighing 11.9 pounds per gallon in the forward tanks would bring the bow down to 23 inches of freeboard; that 42,200 gallons in the after tanks would then bring the barge to an even keel, and the barge would be floating at 3 feet 2½ inches freeboard; that if 81,000 gallons were put in the after tanks, after the 56,500 gallons of molasses had been put in the forward tanks, the stern would be flush with the water.

Assuming the mate's statement to be true that he shut off

the forward tank valves when the bow was down to the bottom of the fender, 23 inches from the deck, there were then in the forward tanks 56,500 gallons of molasses, which [fol. 293] at 11.9 pounds per gallon, weighed about 300 tons. The loading started at 9:05 P. M. At an average pumping rate of 639 gallons per minute this would fix the time of the change-over at 10:34 P. M., 88½ minutes after the pumping into the forward tanks had started. If 81,000 gallons were then pumped into the after tanks the stern would be brought down flush with the water. It would take about two hours and seven minutes to pump these 81,000 gallons into the after tanks and the stern would be flush with the water at about 12:46 A. M. and the total molasses on board would be only 137,500 gallons instead of 156,607 gallons (at 11.9 pounds per gallon), the amount I figure was aboard when the barge sank.

The mate also testified that at the time he made the change-over, he looked into the forward tanks and saw that they were loaded to about one-half their normal capacity. Taking this statement as a basis and assuming that 165,000 gallons was the normal load, bringing the barge down to a freeboard of 14 inches all around (Capt. Haight's figures Ex. 9) and taking the capacity of the forward tanks in relation to the after tanks at the ratio of 7 to 5, then there would have been 48,125 gallons of molasses (255.6 long tons at 11.9 pounds per gallon) in the forward tanks when the change-over was made. Since the average rate of pumping was about 639 gallons per minute, it must have taken about 75 minutes to pump 48,125 gallons into the barge. Hence, if one half the normal capacity was in the forward tanks at the time the change-over was made, the time of such change-over would have been at 10:20 P. M. Further, the remainder of the load, 108,482 gallons, would have all been pumped into the after tanks. If such was the case, the barge would have sunk long before 1:00 A. M. The mate must have erred in his estimate of the amount of molasses in the forward tanks.

Captain Haight's first figures, given at the trial, are based on the assumption that there were 375 long tons of molasses [fol. 294] (75,000 gallons at 11.2 pounds per gallon) in the forward tank when the change-over was made and that the bow was down to a 12 inch freeboard. There was nothing in the evidence on which to assume the 12 inch freeboard. It was an arbitrary assumption. The mate had testified

the bow was down to the fender, which was 23 inches below the deck at the bow. By reducing the freeboard at the bow from 23 inches to 12 inches when the change-over was made, the expert avoided the inevitable conclusion that the stern would be awash at 12:40 A. M. and that the stern of the barge would have sunk within a few minutes thereafter, instead of at 1:07 A. M., some 27 minutes later. The pumps were pumping at the rate of 639 gallons a minute (11.9 pounds per gallon) or about 3.4 tons of molasses per minute. The number of gallons in the forward tank for a 23 inch freeboard at the bow, were calculated by Capt. Haight in his letter of March 13, 1939 (Ex. 9) as 56,500 at 11.9 pounds per gallon, or 300 long tons.

Even if we assume the number of gallons pumped into the scow up to the time she sank as 166,431 gallons, at 11.2 pounds per gallon, as Capt. Haight originally assumed, the mate's testimony cannot be made to fit in with those figures. Actual pumping time was 4 hours and 5 minutes, from 9:05 P. M. to 1:10 A. M. That would be at the rate of 679 gallons per minute or 40,740 gallons per hour. It would require 60,031 gallons at 11.2 pounds per gallon (300 tons) to bring the bow down to a 23 inch freeboard. To pump the 60,031 gallons would require 88.4 minutes, an hour and 28½ minutes. That added to the time the pumping started in the forward tanks, 9:05 P. M. would make 10:33½ P. M. as the time when the change-over was made from the forward to the after tanks. The mate fixed the time of the change-over as between 11:00 and 11:30 P. M. Apparently Capt. Haight in his testimony at the trial assumed that there were 375 tons of molasses in the [fol. 295] forward tanks and that the bow was down to a freeboard of one foot because that would mean that there were 75,000 gallons of molasses at 11.2 pounds per gallon in the forward tanks at that time. To pump the 75,000 gallons at the rate of 679 gallons per minute would take 110.4 minutes or an hour and 50½ minutes. This added to the time at which pumping started, 9:05 P. M., would fix the time of the change-over at 10:55½ P. M., which would be closer to the time of the change-over as estimated by the mate (11 to 11:30 P. M.). The mate's testimony as to the time of the change was only an estimate, while his testimony as to the freeboard at the bow was apparently definite and fitted in with the instructions he is supposed to

have received as to the method to be followed in loading the barge. If we are limited to a choice it would seem that what the mate says he saw was the freeboard at the bow would be more reliable than his guess at the time. However, as the figures show, neither statement of the mate is reliable and we are left to sheer guess work in attempting to draw any conclusions from his testimony.

Further, Capt. Haight's figures are all based on an assumption of Capt. Jeffcott that the barge drew 20 inches when light. This he "estimated from water markings on the raked ends". Capt. Jeffcott inspected the barge in dry dock on November 4th, after the barge had been raised and floated to dry dock. As he himself states (Ex. 4) his assumption of a 20 inch draught for the barge, when light, "may be subject to error". If it is an erroneous assumption, and I think it is, then all of Capt. Haight's figures are valueless and we are left further in the dark on the issue of overloading.

The best that can be said of the state of the record, is that the cause of the accident has been left in doubt. But this does not help the petitioner in these limitation proceedings—because from that doubt the law draws a presumption of unseaworthiness, which would deprive petitioner of the right to limit liability to the value of the barge and her freight then pending.

On this question of limitation of liability there is a further point to be considered. The contract or charter party (Ex. 6) under which it has been stipulated this carriage was to have been made, contains a clause reading as follows:

"The barge owners undertake and agree that barges owned and/or chartered are tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and will maintain the barges in such condition during the life of this contract."

This clause is very similar to the contract provision construed in *Luckenbach v. M. J. McCahan Sugar Ref. Co.*, 248 U. S. 139. In fact it is somewhat stronger. When an owner or chartered owner, person, or company warrants the seaworthiness of a ship he cannot invoke the statutes to limit his liability for damage arising from the breach of such warranty. *Pendleton v. Benner Lines*, 246 U. S. 353; *Luckenbach v. W. J. McCahan Sugar Refining Co.*, *supra*. I think that the clause from the present contract of carriage,

quoted above, comes within this rule of law. It is similar also to the warranty in the case of *Pendleton v. Benner Lines*, *supra*, wherein the Supreme Court held that the ship-owner who had made such a personal contract or agreement could not limit his liability. I am of the opinion that by the terms of its contract, petitioner cannot limit its liability under 46 U. S. C. A. § 183.

Petitioner contends that it is entitled to exoneration from liability because of another clause in the contract of carriage reads as follows:

"It is agreed that the Dunbar Molasses Corporation shall [fol. 297] insure the cargoes carried by the New York Tank Barge Co., Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co., Inc. and/or the owners of such barges; and that neither the New York Tank Barge Co., Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected."

As we have seen, claimant stands in place and stead of the Dunbar Molasses Co., doing the business formerly done by the latter. This was a private contract of carriage and there are no rules of public policy forbidding such a private carrier from contracting to relieve itself of all liability. *The Oceanica*, 170 Fed. 893; *Santa Fe Co. v. Grant Bros.*, 228 U. S. 177.

Insurance was obtained on the cargo of molasses by the United Molasses Co., Ltd. and the claimant purchased the cargo under a C. I. F. contract. The insurance policies contain the following clauses:

"Including transit by craft, raft and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a separate insurance. The assured are not to be prejudiced by any agreement exempting lightermen from liability."

and further:

"Warranted free from liability for loss of or damage to the goods whilst in the custody or care of any carrier or other bailee who may be liable for such loss or damage but only to the extent of such carrier's or bailee's liability.

Warranted free of any claim in respect of goods shipped under a Bill of Lading or contract of carriage stipulating

that the carrier or other bailee shall have the benefit of [fol. 298] any insurance on such goods, but this warranty shall apply only to claims for which the carrier or other bailee is liable under the Bill of Lading or contract of carriage.

Notwithstanding the warranties contained in this clause it is agreed that in the event of loss of or damage to the goods by a peril or perils insured against by this policy for which the carrier or bailee denies or fails to meet his liability the Underwriters shall advance to the assured as a loan without interest a sum equal to the amount they would have been liable to pay under this policy but for the above warranties the repayment thereof to be conditional upon and only to the extent of any recovery which the assured may receive from the carrier or bailee.

It is further agreed that the assured shall with all diligence bring and prosecute under the direction and control of the Underwriters such suit or other proceedings to enforce the liability of the carrier or bailee as the Underwriters shall require and the Underwriters agree to pay such proportion of the costs and expenses of any such suit or proceedings as attach to the amount advanced under the policy."

Clearly, the insurance obtained by the vendor, United Molasses Co., Ltd., was not for the account of the petitioner nor does it purport to protect petitioner. It was stipulated at the trial that the claim of the Commercial Molasses Corporation herein, was made on behalf of the underwriters, who wrote the insurance for the United Molasses Co., Ltd. The Commercial Molasses Corporation was credited by United Molasses Co., Ltd. on account of the purchase price of the molasses, with the amount allowed for the loss by the underwriters. The claimant's losses were thus settled by the underwriters for the vendor, United Molasses Co., Ltd. Presumably the amounts credited to the claimant equalled the loans of the underwriters to the United States Molasses [fol. 299] Co., Ltd., as provided for in the aforementioned clauses of the insurance policies. The loan arrangement, instead of an outright payment of the loss, has been approved in decisions of our highest court and it does not bar a recovery by the insured for the insurer's account. See, *Luckenbach v. McCahan Sugar Ref. Co.* (supra).

In the instant case, however, the situation is quite dif-

ferred. As part of the consideration of the contract of carriage between petitioner and the claimant herein, the claimant (or its predecessor) specifically agreed to insure the cargoes for the account of the petitioner. The paragraph containing that provision has been quoted above. This part of the contract was not fulfilled by claimant. It is conceded that claimant did not insure this cargo for the account of petitioner. As a result, petitioner is exonerated from liability "for any loss in respect of which insurance . . . could have been effected", according to the terms of the contract of carriage.

Claimant contends that because the contract contains an express warranty of seaworthiness, the insurance clause was not intended to cover losses due to unseaworthiness. The warranty was made to the claimant; it would not ordinarily be made to an insurer if the petitioner were obtaining a policy on the cargoes to be carried in its barges. Petitioner could have obtained insurance to cover cargo losses due to unseaworthiness. There is no implied warranty of seaworthiness in a legal liability, or protection and indemnity, policy, obtained by a ship or lighter owner on the cargoes to be carried in its vessels; such a policy insures damage to cargoes due to the unseaworthiness of the vessels. See, *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640.

On this point the instant case is readily distinguishable from *Luckenbach v. McCahan Sugar Ref. Co.* (supra). There a clause in the bill of lading provided that the ship-[fol. 300] owner should have the full benefit of any insurance effected by the shipper on account of the goods. The Court said (at p. 146):

"Such a clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier."

In the *Luckenbach* case the shipper did obtain insurance on the goods. The policies contained a provision whereby the assured warranted that they were free from any liability for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon. After a loss of some of the goods due to the unseaworthiness of the ship, the insurer

advanced the money to the shipper on a loan receipt. The shipowner contended that it should have the benefit of the insurance. This was refused, the Court saying (p. 148):

"The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying it effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right of subrogation [fol. 301] against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier."

In the case at bar, however, the claimant was under an obligation to the petitioner to take out insurance on the cargo. This was not a mere "benefit of insurance" clause. Claimant was contractually obligated to effect insurance for the account of the petitioner. This was part of the consideration moving from the claimant and, in all likelihood, it had an effect on the freight rate.

The two parts of the insurance paragraph in the contract of carriage in this case must be read together, so that the latter part shall be interpreted to mean the same kind of insurance as is referred to in the first part, i. e., insurance for the account of the petitioner. The last part of the insurance paragraph would then in effect read:—"neither the New York Tank Barge Co. Inc. nor such barge shall be liable for any loss in respect of which insurance has been or could have been effected" for the account of the New York Tank Barge Co. Inc.

This provision of the contract of carriage could not be satisfied by the charterer (claimant) taking out insurance for its own account. The contract expressly provides that the charterer, Dunbar Molasses Co. (or its successor, Commercial Molasses Corporation), shall insure the cargoes carried "for the account of the barge owner", in this instance, the petitioner, New York Tank Barge Co. Inc. A policy of insurance on the cargo taken out by the cargo

owner for its own account would ordinarily carry with it the right of subrogation in favor of the insurer against the carrier, the petitioner. But if the policy named the carrier, as the insured, there of course would be no right of subrogation against the carrier, the petitioner herein. *The John Russell*, 68 F. (2d) 901; *Great Lakes Transit Corp. v. Interstate S. S. Co.*, 301 U. S. 646. The contract provision as to insurance in this case is stronger and affords [fol. 302] greater protection to the barge owner than the ordinary benefit of insurance clause.

Claimant argues that the result of this interpretation of the insurance clause would be to nullify the express warranty of seaworthiness contained in the same contract of carriage. I do not see it that way. If the charterer, the claimant herein, had lived up to its obligations under the insurance clause, it would not thereby lose the benefit of the personal warranty of seaworthiness. That warranty would still be in effect and in the event of a loss to the cargo, resulting from the unseaworthiness of the barge, claimant could hold both the petitioner and the barge. See the *Luckenbach* and *Pendleton* cases, *supra*. If the insurance company reimbursed petitioner under the policy claimant was required to obtain for the account of petitioner, that would not be money out of the claimant's pocket; and, of course, the insurer would have no right of subrogation against claimant. (*The John Russell* and *Great Lakes Transit Corp. v. Interstate S. S. Co.*, *supra*.) The premium on the policy is all that the insurance would have cost the claimant, and even the premium would indirectly be borne by petitioner in the freight rate provided in the contract of carriage, which undoubtedly would have been higher if petitioner had to procure its own insurance for cargo losses.

There is another aspect to this issue that should not be overlooked. To add by implication to the broad and general language of the insurance clause, an exception of losses resulting from the unseaworthiness of the barge, would leave the barge owner without insurance that he otherwise might have obtained—a result that would be manifestly unfair. The barge owner had the right to assume that the insurance clause in the contract of carriage meant just what it said, without any implied exceptions. The cargo owner (claimant) has only itself to blame if it failed in its obligation to effect insurance for the account of the barge owner (peti-

[fol. 363] tioner). Apparently claimant felt protected by the insurance its vendor (United Molasses Co., Ltd.) effected and it has had the actual benefit of that protection in this case. It has not suffered from its own breach of the insurance clause of its contract of carriage with petitioner.

As we have seen, the petitioner could have taken out insurance on its own account which would cover cargo losses due to unseaworthiness. In fact, having warranted the seaworthiness of the barges to the claimant, it would seem that insurance covering such a contingency would be the kind most desired by the petitioner. I am of the opinion the aforementioned insurance clause of the contract of carriage was intended to cover any losses the carrier (petitioner) could have insured against, including cargo losses due to unseaworthiness. Since claimant (or its predecessor) contracted to obtain such insurance and did not do so, I am of the opinion that the petitioner should be granted exoneration from liability.

The foregoing opinion shall stand as the Court's findings of fact and conclusions of law, unless either of the parties requests that it be supplemented by additional findings and conclusions and serves and files a copy of such proposed additional findings and conclusions within five days of the filing of this opinion with the Clerk of this Court.

A decree will be entered in accordance with this opinion. Submit proposed decree on the usual notice.

Dated, April 26th, 1939.

Vincent L. Leibell, United States District Judge.

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[fol. 304] IN UNITED STATES DISTRICT COURT

FINAL DECREE—May 22, 1939

[Caption omitted]

Present: Honorable Vincent L. Leibell, District Judge.

A verified petition having been filed in this Court by the above named petitioner on the 16th day of February, 1938, praying for exoneration from or limitation of liability for any and all loss, damage or injury caused by or resulting from the sinking of the "Tank Barge No. 73" on October 2<sup>d</sup> 1937, and an order having been entered on the same date directing monition to issue under the seal of this Court against all persons claiming damages for any and all losses,

damages or injuries occasioned by or resulting from the said sinking to appear before this Court and make due proof of their respective claims on or before the 29th day of March, 1938, and designating Godfrey Updike, Esq. as Commissioner before whom proof of all such claims should be presented in pursuance of such monition; and

Upon the return of said monition proclamation having been made for all persons claiming damage for any losses, damages or injuries as aforesaid to appear and answer the petition herein and to present their claims as aforesaid, and Commercial Molasses Corporation having presented a claim for loss and damage to molasses laden on the "Tank Barge No. 73" in the sum of \$13,000, and no other persons having filed any claims, and this Court having duly issued its order dated May 16, 1938 noting the default of all parties, who had not filed any claims, and the said claimant having filed [fol. 305] its answer to the petition, and the cause having duly come on for trial before this Court, and the parties having appeared by their respective counsel and having adduced their pleadings and proofs, and the Court after due deliberation having handed down its opinion in writing and having made certain findings of fact and conclusions of law pursuant to Rule 46½ of the Rules of the United States Supreme Court denying the petitioner's prayer for limitation of liability but granting the petitioner exoneration from liability,

Now, on all the pleadings and proceedings heretofore had herein, it is, on motion of Bigham, Englar, Jones & Houston, proctors for the claimant herein

Ordered, adjudged and decreed that the prayer for limitation of liability contained in the petition herein, be, and it hereby is, denied; and it is further

Ordered, adjudged and decreed that the petitioner, New York Tank Barge Corporation, as chartered owner of the "Tank Barge No. 73" be, and it hereby is, exonerated from any and all liability to any extent for any injury or loss sustained by Commercial Molasses Corporation in any way arising out of or in consequence of the accident and sinking on October 24, 1937 of the "Tank Barge No. 73" described in the petition herein and it is further

Ordered, adjudged and decreed that neither party shall recover costs from the other.

Vincent L. Leibell, U. S. D. J.

[fol. 306] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF LEIBELL, D. J., ON COSTS

Each party having been successful on one of the two main issues in this litigation.

I have decided to offset costs of one against the other and allow neither party costs (The Leonard Richards, 41 Fed. 818 at 821).

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant, the Commercial Molasses Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of New York with an office and place of business at 230 Park Avenue, in the Borough of Manhattan, City, County and State of New York.

2. Claimant, the Commercial Molasses Corporation was at all of the times mentioned in the claim filed herein, the owner of the certain cargo of molasses therein referred to.

3. Claimant entered into a contract of affreightment with petitioner, a copy of said contract was offered and received in evidence as Exhibit No. 6. It was stipulated in court that the said contract originally entered into between petitioner and the Dunbar Molasses Corporation had been assumed by the claimant, Commercial Molasses Corporation which was doing the business formerly done by the Dunbar Molasses Corporation and that the carriage in the instant case was to be performed under the terms of said contract.

[fol. 307] 4. That pursuant to said contract, the claimant notified the petitioner of the arrival of the steamship "Athelsultan" at pier 1, Hoboken New Jersey with a cargo of molasses consigned to the claimant, and the petitioner sent the barge "T. N. No. 73" to receive a portion of said cargo on the evening of October 23, 1937.

5. This is a proceeding brought by the New York Tank Barge Corporation, as chartered owner of the tank barge "No. 73" for exoneration from or limitation of liability for all claims arising out of the sinking of the "T. N. No. 73" on October 24, 1937, at Pier 1, Hoboken, New Jersey. The

only claim filed in the proceeding was by the Commercial Molasses Corporation for the loss of 165,042 gallons of molasses valued at \$13,000. Petitioner filed due objection to this claim.

6. The "T. N. No. 73" was built sometime during the period of 1916 to 1920 for use in the Mexican oil trade. It was purchased by the Manhattan Tank Barge Company late in the year 1924 and brought to New York in April 1925. Petitioner chartered it from the Manhattan Tank Barge Company in July 1926, on a bare boat basis, only the insurance on the barge being paid by the owner, all wages, equipment and accessories being provided by petitioner. Charter hire was paid on a monthly basis. This charter was in effect at the time the barge sank.

7. The "T. N. No. 73" was a single skin steel tank barge with the following outside dimensions according to a survey made in dry dock: length on deck 165 feet; length on bottom 136 feet; beam 38 feet; depth 8 feet. The rake at each end began at a point 23 inches below the deck. According to the testimony of petitioner's president, Capt. Baldwin, given from memory, the cargo space was approximately 130 feet in length, 38 feet wide and 8 feet deep. Two bulkheads, one running fore and aft, and the other thwartships, [fol. 308] divided the cargo space into two forward tanks each approximately 72' x 19' x 8' and two after tanks each approximately 58' x 19' x 8'. There were also two peak tanks, one forward and one aft. They were 38 feet in beam, less than 8 feet deep and about 15 feet in length at the deck.

8. However, calibration tables prepared when the barge was brought to New York in 1925 indicate that Capt. Baldwin's figures are inaccurate in respect to the ratio of the carrying capacity of the forward and after tanks, the correct ratio being as 7 to 5.

9. There was no evidence as to the length of the peak tanks at the bottom. At either end of the barge there were fenders of wooden planks extending down about 23 inches from the deck. Right at the base of the fenders a rake began and extended to the bottom of the barge. The rakes accounted for the variation in the longitudinal dimensions of the barge as taken on deck and at the bottom.

10. The barge was used for the carriage of molasses and vegetable oils in and about New York Harbor. Petitioner,

on numerous occasions, had thus carried molasses for the claimant.

11. On October 23, 1937, the "M. S. Athelsultan" was unloading a cargo of molasses, consigned to the claimant, into barges belonging to petitioner for carriage from Pier 1, Hoboken, New Jersey, where the "Athelsultan" was moored, to claimant's plant at Baldwin Avenue, Weehawken, New Jersey. The molasses had been purchased by the claimant from United Molasses, Ltd. of London, England, and was to be delivered by the latter C. I. F. at a United States port into shore tanks or barges provided by the purchaser. Sometime between 8:30 and 9:00 P. M. [fol. 309] of the evening of October 23rd, 1937, the "T. N. No. 73" was brought alongside of the "Athelsultan" and made fast with its port side to the ship. Four lines ran from the ship to the barge. The two forward lines were attached to the port bow corner and center bitt of the barge, and the two after lines were attached to the port corner and the starboard corner at the stern of the barge. They were five inch lines, three of them brand new and the fourth just a few days old. The discharge hose of the "Athelsultan" was coupled to the receiving equipment of the barge at about midships. The ship began pumping the molasses at 9:05 P. M.

12. There were, at that time, two men in charge of the "T. N. No. 73", the captain, John Tighe, and the mate, Lester Head. Both were competent and experienced men and had been working for petitioner for a number of years. They opened the valves on the forward tanks and started to load them. The customary procedure in loading molasses in this barge was to load the forward tanks until the bow came down to the bottom of the bow fender, which made a freeboard of 23 inches at the bow. The valves leading to the after tanks would then be opened and the forward valves closed and the loading continued until the stern came down to within two inches of the guard rail at the side of the barge. The guard rail extended 12 inches below the deck. The barge men would then open the forward valves and close the after valves and reload the forward tanks until the barge was trim. A freeboard of about 14 inches all around, was the limit of the load. The officers of petitioner instructed the men to load the barges carry-

ing molasses to such a freeboard and it had proven satisfactory with the "T. N. No. 73" and similar barges.

13. After they commenced to load the forward tanks of the "T. N. No. 73" on the night of October 23rd, 1937, the [fol. 310] captain, seeing that everything was running smoothly, went to his cabin. This was about 9:30 P. M. The cabin was located aft of 'midships. He smoked a cigarette and talked to a friend for a while. The friend left and he went to bed and in about half an hour dozed off.

14. Meanwhile, the mate let the forward tank fill until the base of the bow fender was level with the water and then closed the forward valves and began loading the after tanks. He testified that this change was made somewhere around eleven or eleven thirty. The mate also testified that he looked into the after end of the forward tank before he shut off the forward valves and the molasses was then between the second and third steps from the bottom of the ladder at the cross bulkhead. This was said to be approximately one half the capacity of the forward tanks.

15. After the valves connected to the stern tanks were opened, the loading of these tanks proceeded without incident. Sometime before 1:00 A. M. in the morning of October 24th, the mate was at the bow of the barge talking to the third officer of the ship and a customs' sampler who were aboard the ship. The mate left and went into the cabin, fixed the fires and went out again. He walked up to the bow, looked around, and then went back to the stern of the barge to examine the freeboard. He testified that the stern was then down to within three inches of the guard rail. He decided that it was nearly time to shut off the valves to the after tanks and complete the loading in the forward tanks. He walked up towards the bow and again carried on a conversation with the two men on the ship. They left and the mate went over to the forward valves in order to open them, preparatory to closing the after valves. As he opened the port forward valve he felt the stern of the barge suddenly settle. This occurred about 1:05 A. M. Almost immediately thereafter there was a decided drop at [fol. 311] the stern. The mate went back and seeing that all the stern was under water, started to call the captain.

16. Meanwhile, the captain was awakened by the splash of water. He jumped out of the bunk and landed in water.

When he got near the door of the cabin he met the mate coming to call him. As he got out of the cabin he was up to his chest in water. They walked to the dry part of the barge and then the captain asked the mate what valves he had open. The mate said the after valves were open. The captain told him to close them and as the mate went over to close them there was a sudden lurch down, a second drop or slump of the stern, so that about half the barge, including the after valves, became submerged. The captain called the mate back and they left the barge, going aboard the ship. It was then about 1:07 or 1:10 A. M.

17. When the captain turned in that night, the after hatch, located right aft of the cabin was not dogged down. According to the barge crew the side hatches, located on top of thwartships bulkhead were open as is customary while loading, so that the tanks could be quickly examined. The diver's testimony, given when the trial of the case was reopened at the direction of the Court, was that the side hatches were closed.

18. Although the "T. N. No. 73" had the equipment requisite for receiving and discharging cargo she did not have the necessary power for pumping and steam had to be supplied from some outside source. On the morning in question, after she had been partly submerged, there was nothing that could have been done by the barge crew to unload any of the cargo. When the captain went aboard the "Athelsultan" he asked the ship's officers if the ship's pump could be reversed and some of the molasses sucked back into the ship from the barge. He was informed that [fol. 312] this was not possible. The ship's pump was stopped so that no more molasses was loaded into the barge.

19. While the barge was being loaded it was necessary, at various intervals, to slacken the lines holding the barge fast to the ship. The mate testified that he had slackened them several times during the loading, the last time a short while before the barge sank. However, he also stated that he had not looked at the lines at the time he last examined the freeboard at the stern. He said that he had leaned over the rail from midships and looked back at the guard rail towards the stern in making that examination and did not think of the lines at all. After the stern of the barge sank under water, the barge hung on the bow lines and the dis-

charge hose, until about 6 A. M. in the morning of October 24th when they gave way and the barge went to the bottom.

20. Salvors were engaged by petitioners to raise the barge. After pumping out most of the molasses (only a small amount of it was salvaged) they succeeded in raising the barge and towing her to dry-dock. A survey was made and it was decided that it would be useless to attempt to repair the barge. She was auctioned and sold for scrap. The salvors' fees totalled about \$5,500, whereas the amount realized at the sale was only \$800.

21. No one who was in any way connected with the salvaging operations had been called as a witness on the trial of these proceedings. In the hope that such testimony might throw some additional light on the cause of the sinking I filed a memorandum dated February 24, 1939, requesting, among other things, that the diver who had examined the barge while she was on the bottom be called. Accordingly, his testimony was taken on March 3, 1939. He stated that he found the barge lying about two-thirds submerged in the [fol. 313] mud and canted over on one side at an angle of about 45 degrees. He could see no evidence of leakage. All the hatch covers were dogged down with the exception of the after cargo hatch. He open- two cargo hatches and put in suction hose and some of the molasses was pumped out. He put wire slings around the barge and with the aid of two derricks she was raised to the surface, i. e., until the deck was level with the surface of the water and then towed to dry-dock. He stated that he saw nothing to indicate what caused the barge to sink.

22. When the barge was raised it was found that the cabin had shifted, the deck had sagged in at the after end, and the plates at the turn of the bilge on the port and starboard side of the cargo tanks forward were deeply indented. These indentations were caused by wire slings placed around the barge by the salvors and used to raise her.

23. While the barge was in dry-dock she was examined by several marine surveyors on behalf of petitioner, the underwriters and the cargo interests. None of them could definitely ascertain what caused the barge to sink.

24. One of the marine surveyors employed by the claimant to inspect the barge in dry-dock testified that he found

evidence that a considerable quantity of molasses had gotten into the after peak tank. He felt that this might have been a cause of sinking. There was testimony to the effect that the hatch covers of the peak tanks were always kept closed and dogged down. The assistant superintendent of the petitioner testified that he, along with a representative of the cargo interests, examined the barge at noon time of October 23rd, on the day loading started, that they examined the cargo tanks and they appeared dry and clean, although sticky with a coating of molasses. He also opened [fol. 314] the hatches on the peak tanks and looked into them. They appeared to be all right and so the hatch covers were replaced and dogged down. The diver testified that the peak tank hatch covers were closed when he descended to the barge.

25. Apparently, there are only two possible ways in which molasses could have gotten into the after peak tank—through the bulkhead between the after cargo tanks and the peak tank, or through the hatch cover of the peak tank. All those who examined the barge after it was raised were in agreement that the bulkhead appeared to be tight and staunch. Had there been any break in the bulkhead or substantial leakage through it, that should have been apparent to those making the inspection after the barge was raised. It may be that the after peak hatch cover was removed by the salvors and that the molasses got into the after peak hatch while they were pumping it out of the cargo tanks to facilitate the salvaging operations. Nothing from the diver's testimony would indicate that he had opened any of the peak tank hatches. It may have been done after the barge had been raised, but before it was towed to dry-dock. From the record it is impossible to determine how or when the molasses got into the after peak tank, or how much got in. There were some witnesses who saw the barge as it was brought to the surface but they could do little more than describe its general appearance. The barge was in such a battered condition after the salvage operations, that the inspections later made in dry-dock were necessarily inconclusive. All that could be said of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected.

26. On May 22, 1937, the barge had been inspected by the Insurance Company of North America; certain repairs were

suggested by the insurance company; the barge was dry-docked in May 1937 and all necessary repairs were made. Under ordinary circumstances it would not be necessary to dry-dock the barge again prior to the time of the accident. The barge was painted every year or two, depending on the condition of the ice in the previous winter, and was properly chipped before painting. A cargo of molasses had been carried by the barge just a few days prior to October 23rd without mishap. Nothing had occurred in the interval to damage her. Before the loading commenced an examination was made by a representative of the cargo interests and he pronounced her clean and fit for loading. At the same time an inspection was made by petitioner's assistant superintendent. He found the barge all right, absolutely tight, no leaks. The examination consisted of looking into the tanks through the hatches. The cargo tanks were then covered with a skin of molasses. The peak tanks were examined and the peak hatches were dogged down after that. The captain of the barge stated that he had examined her each day for several days prior to the loading and had found nothing wrong. There was no proof of any structural defects in the barge prior to the sinking which would render her unseaworthy.

27. Molasses is a heavy, viscous cargo, with a tendency to shift or "creep". The barge was fitted with wash plates extending upwards from the bottom of the cargo tanks to minimize this tendency. It was also fitted with equalizers between port and starboard tanks. Because the specific gravity of molasses is quite a bit more than that of water the "T. N. No. 73" had to carry it in slack tanks, that is, the level of the molasses was three or more feet from the top of the cargo tanks, when the barge was loaded to the usual free-board of fourteen inches. Although such a situation was not the best possible, and would require care in handling, I do not think that the necessity of carriage in slack tanks would warrant a finding that the "T. N. No. 73" was not fit for the carriage of molasses.

[fol. 316] 28. Petitioner alleges that the sinking was caused by the negligence of the mate in overloading the after tanks of the barge. I do not find the evidence sufficient to establish this as a fact.

29. Taking into consideration the amount of molasses shipped and the amount unloaded at Weehawken and Albany, I find that there were approximately 156,607 gallons (at 11.9 pounds per gallon) pumped into the "T. N. No. 73" between 9:05 P. M. and 1:10 A. M. Due allowance is made for wastage in these computations. They seem to be further borne out by the statement of H. L. Jones, third officer of the "Athelsultan", that the ship was pumping at a rate of approximately 40,000 gallons an hour.

30. I find that the rate of loading was, on the average, about constant. The molasses was heated to an even temperature by means of steam coils in the holds of the ship and the ship's pump apparently discharged at a constant rate of flow.

31. Reasonably exact statements of the times when pumping started and was stopped have been given, 9:05 P. M. and 1:10 A. M. respectively. However, the most important element, the time of the changeover from the forward to the after tanks, is stated to have been sometime between 11 and 11:30 P. M. The barge was said to have a normal capacity of 160,000 to 175,000 gallons. Based on the calibration tables for the volume capacity of the four cargo tanks, I find that the volume capacity of the forward tanks, in relation to the after tanks, may be put at a ratio of 7 to 5. The tables are more reliable than Capt. Baldwin's unassisted recollection of the size of the tanks. With the molasses being pumped into the barge at a rate close to 40,000 gallons per hour, the time of the change-over from the forward to the after tanks is most important. On the mate's testimony, which is the [fol. 317] only testimony on this point, we have a spread of half an hour.

32. The decision on the issue of whether or not the mate was negligent in loading the after cargo tanks of the barge, requires definite proof of the quantity of molasses in the various tanks when the mate was about to shut off the after tank valves and begin reloading the forward tanks. That was the time he felt a heavy jar, followed by the first slump at the stern. Apparently this took place about 1:05 A. M., October 24th. The loading of the forward tanks had started at 9:05 P. M., October 23rd; the ship's pumps were stopped soon after the accident at about 1:10 A. M. The captain of the barge and his mate climbed aboard the ship about 1:07 A. M.

33. Between 9:05 P. M. and 1:10 A. M. 156,607 gallons of molasses weighing 1,863,635 pounds (1 gallon = 11.9 pounds) or approximately 832 long tons had been discharged into the barge "No. 73" in four hours and five minutes. There is no way of determining what part of this total went into the forward tanks and what part into the after tanks. If we attempt to approach the solution by figuring the number of gallons or tons pumped per minute, there is nothing to show even approximately the number of minutes the molasses was pumped in the respective tanks, because the time when the valves of the forward tanks were shut off and the pumping diverted to the after tanks is not definitely fixed. The mate could not fix that time any more definitely than to state: "I should judge around, somewhere around eleven or eleven thirty".

34. A spread of thirty minutes measured in gallons would be 19,170 gallons; in pounds, 228,123; in long tons, about 101.8. The spread of thirty minutes represents about one-eighth of the load. Whether it was in the forward tanks or [fol. 318] the after tanks, or partly in one and partly in the other, is of vital importance, but on the present record just how it was distributed is a matter of speculation only.

35. Petitioner produced, at the trial, certain experts who endeavored to figure the disposition of the load as between the forward and after tanks, at the time the barge sank. After an examination of their computations I was of the opinion that their estimates and conclusions were not well founded and could not form a satisfactory basis for determining whether at the time of the accident the after tanks had been overloaded, through the negligence of the mate of the barge.

36. One of the estimates, Captain Jeffcott's (Ex. 8) sets forth the capacity of the barge as a unit. However, the important elements in this proceeding are the trim of the barge and the amount of molasses that went into the after tanks. The other computations, Captain Haight's (Ex. 9) show that 56,500 gallons of molasses weighing 11.9 pounds per gallon in the forward tanks would bring the bow down to 23 inches of freeboard; that 42,200 gallons in the after tanks would then bring the barge to an even keel, and the barge would be floating at 3 feet 2½ inches freeboard; that if 81,000 gallons were put in the after tanks, after the 56,500 gallons of

molasses had been put in the forward tanks, the stern would be flush with the water.

37. Assuming the mate's statement to be true that he shut off the forward tank valves when the bow was down to the bottom of the fender, 23 inches from the deck, there were then in the forward tanks 56,500 gallons of molasses, which at 11.9 pounds per gallon, weighed about 500 tons. The loading started at 9:05 P. M. At an average pumping rate of 639 gallons per minute this would fix the time of the change-over at 10:34 P. M., 88½ minutes after the pumping into the forward tanks had started. If 81,000 gallons were then pumped into the after tanks the stern would be brought down flush with the water. It would take about two hours and seven minutes to pump these 81,000 gallons into the after tanks and the stern would be flush with the water at about 12:40 A. M. and the total molasses on board would be only 137,500 gallons instead of 156,607 gallons (at 11.9 pounds per gallon), the amount I figure was aboard when the barge sank.

38. The mate also testified that at the time he made the change-over, he looked into the forward tanks and saw that they were loaded to about one-half their normal capacity. Taking this statement as a basis and assuming that 165,000 gallons was the normal load, bringing the barge down to a freeboard of 14 inches all around (Capt. Haight's figures Ex. 9) and taking the capacity of the forward tanks in relation to the after tanks at the ratio of 7 to 5, then there would have been 48,125 gallons of molasses (255.6 long tons at 11.9 pounds per gallon) in the forward tanks when the change-over was made. Since the average rate of pumping was about 639 gallons per minute, it must have taken about 75 minutes to pump 48,125 gallons into the barge. Hence, if one half of the normal capacity was in the forward tanks at the time the change-over was made, the time of such change-over would have been at 10:20 P. M. Further, the remainder of the load, 108,482 gallons, would have all been pumped into the after tanks. If such were the case, the barge would have sunk long before 1:00 A. M. The mate must have erred in his estimate of the amount of molasses in the forward tanks.

39. Captain Haight's first figures, given at the trial, are based on the assumption that there were 375 long tons of

molasses (75,000 gallons at 11.2 pounds per gallon) in the forward tank when the change-over was made and that the [fol. 320] bow was down to a 12 inch freeboard. There was nothing in the evidence on which to assume the 12 inch freeboard. It was an arbitrary assumption. The mate had testified the bow was down to the fender, which was 23 inches below the deck at the bow. By reducing the freeboard at the bow from 23 inches to 12 inches when the change-over was made, the expert avoided the inevitable conclusion that the stern would be awash at 12:40 A. M. and that the stern of the barge would have sunk within a few minutes thereafter, instead of at 1:07 A. M., some 27 minutes later. The pumps were pumping at the rate of 639 gallons a minute (11.9 pounds per gallon) or about 3.4 tons of molasses per minute. The number of gallons in the forward tank for a 23 inch freeboard at the bow, were calculated by Capt. Haight in his letter of March 13, 1939 (Ex. 9) as 56,500 at 11.9 pounds per gallon, or 300 long tons.

40. Even if we assume the number of gallons pumped into the scow up to the time she sank as 166,431 gallons, at 11.2 pounds per gallon, as Capt. Haight originally assumed, the mate's testimony cannot be made to fit in with those figures. Actual pumping time was 4 hours and 5 minutes, from 9:05 P. M. to 1:10 A. M. That would be at the rate of 679 gallons per minute or 40,740 gallons per hour. It would require 60,031 gallons at 11.2 pounds per gallon (300 tons) to bring the bow down to a 23 inch freeboard. To pump the 60,031 gallons would require 88.4 minutes, an hour and 28½ minutes. That added to the time the pumping started in the forward tanks, 9:05 P. M. would make 10:33½ P. M. as the time when the change-over was made from the forward to the after tanks. The mate fixed the time of the change-over as between 11:00 and 11:30 P. M. Apparently Capt. Haight in his testimony at the trial assumed that there were 375 tons of molasses in the forward tanks and that the bow was down to a freeboard of one foot because that would mean that there were 75,000 [fol. 321] gallons of molasses at 11.2 pounds per gallon in the forward tanks at that time. To pump the 75,000 gallons at the rate of 679 gallons per minute would take 110.4 minutes or an hour and 50½ minutes. This added to the time at which pumping started, 9:05 P. M., would fix the time of the change-over at 10:55½ P. M., which would be

closer to the time of the change-over as estimated by the mate (11 to 11:30 P. M.) The mate's testimony as to the time of the change was only an estimate, while his testimony as to the freeboard at the bow was apparently definite and fitted in with the instructions he is supposed to have received as to the method to be followed in loading the barge. If we are limited to a choice it would seem that what the mate says he saw was the freeboard at the bow would be more reliable than his guess at the time. However, as the figures show, neither statement of the mate is reliable and we are left to sheer guess work in attempting to draw any conclusions from his testimony.

41. Further, Capt. Haight's figures are all based on an assumption of Capt. Jeffcott that the barge drew 20 inches when light. This he "estimated from water markings on the raked ends". Capt. Jeffcott inspected the barge in dry dock on November 4th, after the barge had been raised and floated to dry dock. As he himself states (Ex. 4) his assumption of a 20 inch draught for the barge, when light, "may be subject to error". If it is an erroneous assumption, and I think it is, then all of Capt. Haight's figures are valueless and we are left further in the dark on the issue of overloading.

42. The contract or charter party (Ex. 6) under which it has been stipulated this carriage was to have been made, contains a clause reading as follows:

"The barge owners undertake and agree that barges [fol. 322] owned and/or chartered are tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and will maintain the barges in such condition during the life of this contract."

43. Another clause in the contract of carriage reads as follows:

"It is agreed that the Dunbar Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co., Inc. in its own, or chartered or operated barges, for the account of New York Tank Barge Co., Inc. and/or the owners of such barges; and that neither the New York Tank Barge Co., Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected."

44. Insurance was obtained on the cargo of molasses by the United Molasses Co., Ltd. and the claimant purchased the cargo under a C. I. F. contract. The insurance policies contain the following clauses:

"Including transit by craft, raft and/or lighter to and from the vessel. Each craft, raft, and/or lighter to be deemed a separate insurance. The assured are not to be prejudiced by any agreement exempting lightermen from liability."

and further:

"Warranted free from liability for loss of or damage to the goods whilst in the custody, or care of any carrier or other bailee who may be liable for such loss or damage but only to the extent of such carrier's or bailee's liability. [fol. 323] Warranted free of any claim in respect of goods shipped under a Bill of Lading or contract of carriage stipulating that the carrier or other bailee shall have the benefit of any insurance on such goods, but this warranty shall apply only to claims for which the carrier or other bailee is liable under the Bill of Lading or contract of carriage.

Notwithstanding the warranties contained in this clause it is agreed that in the event of loss of or damage to the goods by a peril or perils insured against by this policy for which the carrier or bailee denies or fails to meet his liability the Underwriters shall advance to the assured as a loan without interest a sum equal to the amount they would have been liable to pay under this policy but for the above warranties the repayment thereof to be conditional upon and only to the extent of any recovery which the assured may receive from the carrier or bailee.

It is further agreed that the assured shall with all diligence bring and prosecute under the direction and control of the Underwriters such suit or other proceedings to enforce the liability of the carrier or bailee as the Underwriters shall require and the Underwriters agree to pay such proportion of the costs and expenses of any such suit or proceedings as attach to the amount advanced under the policy."

45. The insurance obtained by the vendor, United Molasses Co., Ltd., was not for the account of the petitioner nor does it purport to protect petitioner.

46. It was stipulated at the trial that the claim of the Commercial Molasses Corporation herein, was made on behalf of the underwriters, who wrote the insurance for the United Molasses Co., Ltd. The Commercial Molasses Corporation was credited by United Molasses Co., Ltd. on [fol. 324] account of the purchase price of the molasses, with the amount allowed for the loss by the underwriters. The claimant's losses were thus settled by the underwriters for the vendor, United Molasses Co., Ltd. Presumably the amounts credited to the claimant equalled the loans of the underwriters to the United Molasses Co., Ltd., as provided for in the aforementioned clauses of the insurance policies.

47. It is conceded that claimant did not insure this cargo for account of petitioner.

#### CONCLUSIONS OF LAW

1. When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, I find that this loss resulted from unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 51 F. (2d) 494.

2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner of the right to limit liability to the value of the barge and her freight then pending.

3. The clause of the contract referred to in Finding of Fact No. 42, is very similar to the contract provision construed in *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U. S. 139. In fact it is somewhat stronger. When an owner or chartered owner personally warrants the seaworthiness of a ship, he cannot invoke the statutes to limit his liability for damage arising from the breach of such [fol. 325] warranty. *Pendleton v. Benner Lines*, 246 U. S. 353; *Luckenbach v. W. J. McCahan Sugar Refining Co.*, supra. The clause from the present contract of carriage referred to above comes within this rule of law. It is sim-

ilar also to the warranty in the case of *Pendleton v. Benner Lines*, supra, wherein the Supreme Court held that the shipowner who had made such personal contract or agreement could not limit his liability. I am of the opinion that by the terms of its contract, petitioner cannot limit its liability under 46 U. S. C. A., sec. 183.

4. This was a private contract of carriage and there are no rules of public policy forbidding such a private carrier from a contract to relieve itself of all liability. The *Oceanica*, 170 Fed. 893; *Sante Fe Co. v. Grant Bros.*, 228 U. S. 177.

5. The loan arrangement, instead of an outright payment of the loss, has been approved in decisions of our highest court and it does not bar a recovery by the insured for the insurer's account. See, *Luckenbach v. McCahan Sugar Ref. Co.* (supra).

6. In the instant case, however, the situation is quite different. As part of the consideration of the contract of carriage between petitioner and the claimant herein, the claimant (or its predecessor) specifically agreed to insure the cargoes for the account of the petitioner. The paragraph containing that provision has been quoted above (Finding of Fact No. 46). This part of the contract was not fulfilled by claimant. It is conceded that claimant did not insure this cargo for the account of petitioner. As a result, petitioner is exonerated from liability "for any loss in respect of which insurance \* \* \* could have been effected", according to the terms of the contract of carriage.

7. Claimant contends that because the contract contains [fol. 326] an express warranty of seaworthiness, the insurance clause was not intended to cover losses due to unseaworthiness. The warranty was made to the claimant; it would not ordinarily be made to an insurer if the petitioner were obtaining a policy on the cargoes to be carried in its barges. Petitioner could have obtained insurance to cover cargo losses due to unseaworthiness. There is no implied warranty of seaworthiness in a legal liability, or protection and indemnity, policy, obtained by a ship or lighter owner on the cargoes to be carried in its vessels; such a policy insures damage to cargoes due to "the unseaworthiness of the vessels. See, *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640.

8. On this point the instant case is readily distinguishable from *Luckenbach v. McCahan Sugar Ref. Co.* (*supra*). There a clause in the bill of lading provided that the shipowner should have the full benefit of any insurance effected by the shipper on account of the goods. The Court said (at p. 146):

"Such a clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier."

9. In the *Luckenbach* case the shipper did obtain insurance on the goods. The policies contained a provision whereby the assured warranted that they were free from any liability for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon. After a loss of some of the goods due to the unseaworthiness of the ship, the insurer [fol. 327] advanced the money to the shipper on a loan receipt. The shipowner contended that it should have the benefit of the insurance. This was refused, the Court saying (p. 148):

"The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying it effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right of subrogation against the insurers. The insurer has, on the hand, by the general law, a right of subrogation against the carrier."

10. In the case at bar, however, the claimant was under an obligation to the petitioner to take out insurance on the cargo. This was not a mere "benefit of insurance" clause. Claimant was contractually obligated to effect insurance

for the account of the petitioner. This was part of the consideration moving from the claimant and, in all likelihood, it had an effect on the freight rate.

11. The two parts of the insurance paragraph in the contract of carriage in this case must be read together, so that the latter part shall be interpreted to mean the same kind of insurance as is referred to in the first part, i. e., insurance for the account of the petitioner. The last part of the insurance paragraph would then in effect read:—"neither the New York Tank Barge Co. Inc. nor such barge shall be liable for any loss in respect of which insurance [fol. 328] has been or could have been effected" for the account of the New York Tank Barge Co. Inc.

12. This provision of the contract of carriage could not be satisfied by the charterer (claimant) taking out insurance for its own account. The contract expressly provides that the charterer, Dunbar Molasses Co. (or its successor, Commercial Molasses Corporation), shall insure the cargoes carried "for the account of the barge owner", in this instance, the petitioner, New York Tank Barge Co. Inc. A policy of insurance on the cargo taken out by the cargo owner for its own account would ordinarily carry with it the right of subrogation in favor of the insurer against the carrier, the petitioner. But if the policy named the carrier, as the insured, there of course would be no right of subrogation against the carrier, the petitioner herein. The *John Russell*, 68 F. (2d) 901; *Great Lakes Transit Corp. v. Interstate S. S. Co.*, 301 U. S. 646. The contract provision as to insurance in this case is stronger and affords greater protection to the barge owner than the ordinary benefit of insurance clause.

13. Claimant argues that the result of this interpretation of the insurance clause would be to nullify the express warranty of seaworthiness contained in the same contract of carriage. I do not see it that way. If the charterer, the claimant herein, had lived up to its obligations under the insurance clause, it would not thereby lose the benefit of the personal warranty of seaworthiness. That warranty would still be in effect and in the event of a loss to the cargo, resulting from the unseaworthiness of the barge, claimant could hold both the petitioner and the barge. See

the Luckenbach and Pendleton cases, *supra*. If the insurance company reimbursed petitioner under the policy claimant was required to obtain for the account of petitioner, that would not be money out of the claimant's pocket; and, of course, the insurer would have no right of subrogation [fol. 329] against claimant. (The John Russell and Great Lakes Transit Corp. v. Interstate S. S. Co., *supra*.) The premium on the policy is all that the insurance would have cost the claimant, and even the premium would indirectly be borne by petitioner in the freight rate provided in the contract of carriage, which undoubtedly would have been higher if petitioner had to procure its own insurance for cargo losses.

14. There is another aspect to this issue that should not be overlooked. To add by implication to the broad and general language of the insurance clause, an exception of losses resulting from the unseaworthiness of the barge, would leave the barge owner without insurance that he otherwise might have obtained—a result that would be manifestly unfair. The barge owner had the right to assume that the insurance clause in the contract of carriage meant just what it said, without any implied exceptions. The cargo owner (claimant) has only itself to blame if it failed in its obligation to effect insurance for the account of the barge owner (petitioner). Apparently claimant felt protected by the insurance its vendor (United Molasses Co., Ltd.) effected and it has had the actual benefit of that protection in this case. It has not suffered from its own breach of the insurance clause of its contract of carriage with petitioner.

15. As we have seen, the petitioner could have taken out insurance on its own account which would cover cargo losses due to unseaworthiness. In fact, having warranted the seaworthiness of the barges to the claimant, it would seem that insurance covering such a contingency would be the kind most desired by the petitioner. I am of the opinion the aforementioned insurance clause of the contract of carriage was intended to cover any losses the carrier (petitioner) could have insured against, including cargo losses due to unseaworthiness. Since claimant (or its predecessor) contracted to obtain such insurance and did not do so,

[fol. 330] I am of the opinion that the petitioner should be granted exoneration from liability.

Vincent L. Leibell, U. S. D. J.

Dated, New York, N. Y., May 16th, 1939.

Counsel for respondent have requested that the above findings and conclusions be signed. They repeat almost verbatim the opinion filed by the Court in this proceeding.

V. L. Leibell, U. S. D. J.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL AND ORDER ALLOWING APPEAL

[Title omitted]

SIRS:

Please take notice, that Commercial Molasses Corporation, claimant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on [fol. 331] the 22nd day of May, 1939, in so far as the said decree exonerates the petitioner, New York Tank Barge Corporation as chartered owner of the tank barge "No. 73", from any and all liability to any extent for any injury or loss sustained by Commercial Molasses Corporation, claimant, in any way arising out of or in consequence of the accident and sinking on October 24, 1937 of the "Tank Barge No. 73".

Dated, New York, N. Y., August 16, 1939.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors, for Claimant, Commercial Molasses Corporation, 99 John Street, New York, N. Y.

To: Charles Weiser, Esq., Clerk. Messrs. Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Petitioner, 120 Broadway, New York, N. Y.

ORDER

The foregoing appeal is hereby allowed this 16th day of August, 1939.

Edward A. Conger, U. S. D. J.

## [fol. 332] IN UNITED STATES DISTRICT COURT

## CLAIMANT'S ASSIGNMENT OF ERRORS

The claimant, Commercial Molasses Corporation, hereby assigns error to the proceedings and decree of the District Court in the above entitled action, as follows:

First: The District Court erred in exonerating the petitioner, New York Tank Barge Corporation, from any and all liability to any extent for any injury or loss sustained by the Commercial Molasses Corporation in any way arising out of or in consequence of the accident and sinking on October 24, 1937 of the "Tank Barge No. 73".

Second: The District Court erred in holding that as a part of the consideration of the contract of carriage between the petitioner and the claimant herein, the claimant specifically agreed to insure the cargo for the account of the petitioner.

Third: The District Court erred in holding that there was any obligation on the part of the claimant to insure the cargo for the account of the petitioner which was not fulfilled by the claimant.

Fourth: The District Court erred in holding that the claimant was obligated to insure the cargo for account of the petitioner against loss or damage caused by unseaworthiness of the petitioner's vessel.

Fifth: The District Court erred in holding that the petitioner could have obtained insurance to cover cargo losses due to unseaworthiness of its own barge.

Sixth: The District Court erred in failing to hold that [fol. 333] there was no evidence that the claimant could have obtained insurance on the cargo for account of the petitioner against unseaworthiness of its barge.

Seventh: The District Court erred in holding that there is no implied warranty of seaworthiness in a legal liability or protection and indemnity policy obtained by a ship or lighter owner on cargoes to be carried in its own vessels.

Eighth: The District Court erred in holding that such policies insure damage to cargo due to the unseaworthiness of the vessels.

Ninth: The District Court erred in giving a construction to the insurance clause which diminished or nullified the effect of the warranty of seaworthiness contained in the contract.

Tenth: The District Court erred in giving to the insurance clause the effect of exonerating the petitioner from liability for a loss resulting from the unseaworthiness of its own barge.

Eleventh: The District Court erred in failing to hold that the clause containing the warranty of seaworthiness and the insurance clause were complementary and that therefore where there is liability under the contract for damage resulting from unseaworthiness there is no obligation to insure.

Bigham, Englar, Jones & Houston, Proctors for  
Claimant, Commercial Molasses Corporation, 99  
John Street, New York, N. Y.

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[fol. 334] IN UNITED STATES DISTRICT COURT

PETITIONER'S CROSS-ASSIGNMENT OF ERRORS

The petitioner, New York Tank Barge Corporation, hereby assigns error and files its cross-assignment of errors in the decision and decree of the District Court for the Southern District of New York herein as follows:

1. In that the District Court denied to petitioner the statutory limitation of liability prayed for.
2. In that the District Court failed to find and decree petitioner's right to the statutory limitation of liability prayed for.
3. In that the District Court failed to find that the weight of evidence established that the "T. N. No. 73" sank because of negligence of her crew in overloading her stern tanks.
4. In that the District Court failed to find that the weight of evidence established the fitness of the "T. N. No. 73" for receiving the cargo of molasses when her loading commenced.
5. In that the District Court failed to find that the "T. N. No. 73" was seaworthy.

6. In that the District Court failed to find that the sinking of the "T. N. No. 73" occurred without the privity of knowledge of petitioner.

7. In that the District Court found that there were approximately 156,607 gallons pumped into the "T. N. No. 73" between 9:05 P. M. and 1:10 A. M., and failed to find that a [fol. 335] quantity of approximately 165,042 was established by the claimant.

8. In that the District Court found that the computations of the experts were not well-founded and could not form a satisfactory basis for determining whether at the time of the accident the after tanks had been overloaded through the negligence of the mate of the barge.

9. In that the District Court's opinion apparently rested upon the conclusion that overloading of the stern tanks as the cause of the sinking could not be established unless proven with arithmetical certainty.

10. In that the District Court held that the cause of the accident has been left in doubt.

11. In that the District Court held that the inspections of the "T. N. No. 73" on drydock after the accident were inconclusive.

12. In that the District Court erroneously stated the law as to a presumption of unseaworthiness.

13. In that the District Court failed to find that the testimony offered an alternative to unseaworthiness in explanation of the disaster, and that the claimant had therefore failed to sustain its burden of proving that the disaster was due to unseaworthiness.

14. In that the District Court refused to award taxable costs to the petitioner.

Kirlin, Campbell, Hickox, Keating & McGrann, Proctors for Petitioner, Office & P. O. Address, 120 Broadway, Borough of Manhattan, New York City.

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[fol. 336] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CERTAIN EXHIBITS

[Title omitted]

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that Petitioner's

Exhibits 1, 5 and 7 and Claimant's Exhibit D which were submitted to the District Court and marked in evidence, need not be printed or reproduced as part of the record herein, but may be produced and referred to on appeal by counsel for either party with the same force and effect as if the same were printed or reproduced in full in this record.

Dated, New York, February 29, 1940.

Bigham, Englar, Jones & Houston, Proctors for  
Claimant-Appellant. Kirlin, Campbell, Hickox,  
Keating & McGrann, Proctors for Petitioner-  
Appellee.

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[fol. 337] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

[Title omitted]

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, February 29, 1940.

Bigham, Englar, Jones & Houston, Attorneys for  
Claimant-Appellant. Kirlin, Campbell, Hickox,  
Keating & McGrann, Attorneys for Petitioner-  
Appellee.

[fol. 338] Clerk's Certificate to foregoing transcript  
omitted in printing.

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[fol. 339] UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE SECOND CIRCUIT, OCTOBER TERM, 1939

No. 331

(Argued May 2, 1940. Decided July 30, 1940)

COMMERCIAL MOLASSES CORPORATION, Appellant,  
against

NEW YORK TANK BARGE CORPORATION, Appellee

Appeal from a decree in the admiralty, dismissing the claim  
of a cargo owner against a ship, in limitation proceedings  
brought under the 56th Admiralty Rule

Before L. HAND, Augustus N. HAND and CLARK, Circuit  
Judges.

Leonard J. Matteson for the appellant;

Robert S. Erskine for the appellee.

[fol. 340] L. HAND, C. J.:

This appeal is from a decree in the admiralty disposing  
of a petition for limitation of liability, filed by the New  
York Tank Barge Corporation, as owner of the barge,  
"T. N. No. 73". This company filed the customary petition  
and stipulation and the cause was referred to a commis-  
sioner to receive proofs of claim; only one claim was filed—  
that of the Commercial Molasses Corporation—the owner  
of the cargo at the time the barge sank. The facts as de-  
veloped upon the trial were in substance as follows: On  
October 11, 1928, the petitioner, the Barge Corporation, and  
the claimant's predecessor, the Dunbar Molasses Corpora-  
tion, entered into a contract for five years from February  
1, 1929, to January 31, 1934, by which the Barge Corpora-  
tion agreed to carry, and the Molasses Corporation agreed  
to ship, all molasses of the Molasses Corporation, or its  
subsidiaries, in New York Harbor from steamers or tide-  
water terminals or refineries, to the Molasses Corporation's  
customers in the Harbor. The contract fixed the price for  
various points of destination, and contained the following  
two clauses on which the controversy turned in the district  
court: "The barge owners undertake and agree that barges

owned and/or chartered are tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and will maintain the barges in such condition during the life of this contract." Several paragraphs further on in the contract occurred the other clause: "The Dunbar Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co., Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc. and/or the owners of such barges; and \* \* \* neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in [fol. 341] respect of which insurance has been or could have been effected". This contract was extended to cover the year 1937, and was in force when the loss happened. On October 23rd of that year, the Barge Company delivered alongside the SS. "Athelsultan" in New York Harbor the barge, "T. N. No. 73" to be filled with molasses. She lay along the port side of the ship, made fast by four lines; and the molasses was pumped into her through a hose from the tanks of the "Athelsultan". The barge had a rake at either end, beginning 23 inches below the deck, and making forward and aft peak tanks, but the main cargo holds were four tanks, made by two bulkheads, one running fore and aft, and the other, thwartships. Between 8:30 and 9:00 on the evening of the 23rd, the "Athelsultan" began to fill the two forward tanks; this continued until some time between 11:00 and 11:30, when the valves to the forward tanks were closed and those to the after tanks were opened, and the molasses began to flow into these. The ship continued to pump into the after tanks until about five minutes after one in the morning of the 24th, when, for some unexplained reason, the barge unexpectedly lurched and shortly afterwards sank. The valve leading to the after tanks had never been shut off after the ship began to fill them.

The customary method of stowing the barge was as follows: molasses was pumped into the forward tanks until the barge had a fixed freeboard forward; then into the stern tanks until the stern had another fixed freeboard; then back once more into the forward tanks until she was trimmed fore and aft. Shortly before one in the morning, the stern had about the proper freeboard, and the mate went forward to tell the men on the ship to open the forward valve to trim the barge. He engaged in some talk on the way which de-

laid him, and the Barge Company attributed the sinking to his negligence in waiting too long. Both parties put in [fol. 342] a great deal of evidence; both by experts, as to the theoretical capacity of the barge at various freeboards, and by lay witnesses as to the facts. The judge examined all the evidence with great care and thoroughness—of his own motion requiring the case to be reopened for further light—but in the end concluded “that the cause of the accident has been left in doubt”. From this he held the Barge Company liable because of the “presumption” of unseaworthiness, arising from the barge’s sinking without adequate explanation. However, as he concluded that the second clause of the contract quoted above, relieved the Barge Company of the covenant of seaworthiness contained in the first (the Molasses Company having failed to take out any insurance for the Barge Company) he dismissed the claim (1939) A. M. C. 673. The Molasses Company appealed.

The finding that the “cause of the accident has been left in doubt”; means, we take it, that the evidence as to whether or not the barge sank because of unseaworthiness, was so evenly matched that the judge could come to no conclusion upon the issue. Though negative in form, it was as much a “finding” as an affirmative finding, and we are to respect it as such. *Nashville Interurban Ry. v. Barnum*, 212 Fed. Rep. 634 (C. C. A. 2). Although Admiralty Rule 46½ does not lay down the measure of conclusiveness of findings in the admiralty, it prescribes nothing different from Rule 52 (a) of the Rules of Civil Procedure. The *Niel Maersk*, 91 Fed. (2d) 932 (C. C. A. 2); *Barlow v. Pan Atlantic SS. Co.*, 101 Fed. (2d) 697 (C. C. A. 2). Therefore, since we cannot say that the finding was “clearly erroneous” in holding that no conclusion was possible upon the issue; we are to dispose of the case with that as datum.

It is well settled that the owner of a vessel always impliedly covenants that she is seaworthy unless he expressly [fol. 343] stipulates the contrary (*Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82) and unless there is something exceptional in the situation at bar—of which more hereafter—the promisee has the burden of proving the breach, by which we mean that, if the judge is unable to make up his mind upon the issue, the promisee fails. It must, however, be owned that the matter has become somewhat embroiled by the loose use of the phrase, “burden of proof”, and the word, “pre-

sumption"—the particular offender being the second. It has for long been the custom of judges to say, when a ship founders, or developes some defect, shortly after her voyage begins, that there is a "presumption" that she was unseaworthy when she broke ground. The question here is whether this "presumption" has any effect upon the "burden of proof".

In England at any rate the law is plain, though at the start there was confusion. *Watson v. Clark*, 1 Dow. 336, arose on a maritime insurance policy; the insured ship had turned back, clearly unseaworthy, within a fortnight after leaving Belize, Honduras, and the underwriter alleged that she had been unseaworthy at the outset of the voyage. Both Lord Eldon and Lord Redesdale said that when a ship becomes unable to go on with her venture "a short time" after leaving port, there is a "presumption" that she was unseaworthy when she started, and that "the onus probandi" is thereafter upon the assured to prove the contrary. This may have only meant that the owner must put in some explanatory evidence on penalty of having the issue taken against him; but it must be confessed that the phrase, "onus probandi", in all probability meant more than that. The point was cleared up in *Pickup v. Thames & Mersey Marine Insurance Co.*, L. R. 3 Q. B. 594 (1878). In that case the judge at nisi prius had answered a question of the jury in the language of Lord Eldon, and both appellate courts [fol. 344] held that this was wrong; they declared that while the development of unexplained defects shortly after the ship breaks ground, will justify relating them back to that time, yet the assurer must satisfy the jury that she was unseaworthy, and that it was an error to tell the jury anything else. The Privy Council made the same ruling in *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co.* (1901), App. Cas. 362, 366; and the last word is *Lindsay v. Klein* (1911), App. Cas. 194, 203-205. In that case also the ship broke down soon after the beginning of the voyage and had to put back; and the owners sought to charge the cargo with a contribution in general average which the shippers resisted on the ground that the ship was unseaworthy. So the House of Lords held on the evidence; and while it is true that the speech of Lord Shaw of Dumfermline was dictum, nevertheless at some length he discussed the question and overruled *Watson v. Clark*, *supra* (1 Dow. 336) so far as

the House of Lords can ever be said to overrule its own decisions. There can be no doubt that by the law of England (and of Scotland as well) although the development of a defect early in the voyage is proper evidence on which to base a claim of unseaworthiness, it is nothing more, and the promisee loses, if the evidence as a whole is too evenly balanced to admit an affirmative conclusion.

The law is not so clear in this country. Before 1813 (when *Watson v. Clark*, *supra* (1 Dow. 336) was decided) several courts had indeed held that if a vessel became unfit shortly after she broke ground and no explanation was offered, she would be "presumed" to have been unseaworthy when she started out. *Barnewall v. Church*, 1 Caines 217, 234, 235 (1803); *Talcot v. Commercial Insurance Co.*, 2 Johns. 124 (1807); *Cort v. Delaware Insurance Co.*, 2 Wash. C. C. 375 (1809) (semble). And since 1813 the same ruling has been made again and again. *Paddock v. Franklin Insurance Co.*, 11 Pick. 227, 237 (1831); *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427, 436, 437 (1865); *Work v. Leathers*, 97 U. S. 379 (1878); *The Arctic Bird*, 109 Fed. Rep. 167 (1901); *Forbes v. Merchants' E. & T. Co.*, 111 Fed. Rep. 796, 800 (1901); *aff'd*, 120 Fed. Rep. 1019; *Oregon Round Lumber Co. v. Portland & Asiatic S.S. Co.*, 162 Fed. Rep. 912, 920, 921 (1908); *Sanbern v. Wright & Cobb Lighterage Co.* (1909), 171 Fed. Rep. 449; *aff'd*, 179 Fed. Rep. 1021; *The Katharine B. Guinan*, 176 Fed. Rep. 301 (1910); *The Loyal*, 204 Fed. Rep. 930 (1913); *U. S. Metals Refining Co. v. Jacobus*, 205 Fed. Rep. 896 (C. C. A. 2); *The Jungshoved*, 290 Fed. Rep. 733 (1923); *S. C. Loveland Co. v. Bethlehem Steel Co.*, 33 Fed. (2d) 655 (C. C. A. 3); *The Harper No. 193*, 42 Fed. (2) 161 (C. C. A. 2). (*Dupont v. Vance*, 19 How. 162, has been several times erroneously cited as in accord with this. The mistake apparently arose because the quotation marks in *The Arctic Bird*, *supra*, which correctly indicate the end of the quotation from *Dupont v. Vance*, were misplaced in *Oregon Round Lumber Co. v. Portland & A. S. S. Co.*) We have not tried to collect all the cases; but there can be no question that they amply establish the "presumption"; and a number of them say that it shifts the "onus probandi" or "burden of proof" to the other side. We need not, however, take these statements as necessarily intended to mean that it is the owner which must persuade the court of the ship's seaworthiness; in none of the cases was exactness of ex-

pression as crucial as it is here, and was in *Pickup v. Thames & Mersey M. I. Co.*, supra (L. R. 3 Q. B. 594). And indeed it is notorious that judges often speak of the "shifting" of the "burden of proof" when they mean no more than that, if the trial had ended with the evidence that is said to "shift" the "burden", that party would lose to whose shoulders it had been shifted. Even in cases like *The Harper No. 193*, supra (42 Fed. (2) 161) where we did indeed use the phrase in a way that seemed to mean that the [fol. 346] shipowner must satisfy the court that the barge was seaworthy, it is impossible to be sure that we meant more than this. At any rate, if we did, it would certainly be wrong to apply it here.

In the case at bar the Barge Company was acting as a private carrier and was therefore only a bailee; it is well settled that the burden rests upon the bailor to prove some breach of duty by the bailee other than his mere failure to return. *Kohlsaat v. Parkersburg & M. Sand Co.*, 266 Fed. Rep. 283 (C. C. A. 4); *Alpine Forwarding Co. v. Pennsylvania R. R.*, 60 Fed. (2) 734 (C. C. A. 2); *Gerhard & Hey, Inc. v. Cattaraugus T. Co.*, 241 N. Y. 413. The Molasses Company acknowledged this by alleging in its claim as a fault that the barge was unseaworthy; it was obliged to do so; and, having done so, it had to persuade the judge or fail. It is true that the facts necessary to create any legal liability are what the law chooses to make them, and what we call a "defence" may theoretically quite as well be treated as part of the constituent facts of the liability; it is mere convention whether the plaintiff must show that it does not exist, or the defendant that it does; or vice versa. This is well illustrated by the controversy of contributory negligence. But once the law has established which party shall prove a fact, that party must do so, and the duty of doing so does not shift, save possibly in extraordinary circumstances of which we cannot at the moment recall an instance. In all cases, therefore, where the shipper must show the ship unseaworthy, that duty remains upon him throughout. It is enough on his case in chief if he shows that she developed an unaccounted for defect early in the voyage, because it is reasonable to infer from that that the defect must have existed before, but he must lay any doubts which remain when the whole evidence is in. *Del Vecchio v. Bowers*, 296 U. S. 280, 286; *New York Life Ins. Co. v. Gamer*, 303 U. S. 161, 170. The question as to the burden of proof under § 3

[fol. 347] of the Harter Act is not to be confused with this. That section gives the owner an excuse for a fault which by hypothesis the shipper has proved; and the owner must prove it, as anyone must prove an excuse. *The Southwark*, 191 U. S. 1, 12; *The Wilderoft*, 201 U. S. 378, 386; *May v. Hamburg*, 290 U. S. 333, 346. But the question here is whether the ship was at fault at all; and she was not unless she was unseaworthy.

We need not examine whether this was a "presumption of fact", or a "presumption of law". Strictly the first phrase is misleading, and has caused much confusion, though it accords with colloquial usage. *Pariso v. Towse*, 45 Fed. (2) 962, 964 (C. C. A. 2). What we are here dealing with is a rational inference, unlike a true "presumption" which presupposes that no inference can safely be drawn from the facts which make it up, and which merely relieves the party from proving the issue unless his antagonist moves. We do not understand that the judge in declaring that he could not decide whether the barge was seaworthy, did not consider her unexplained sinking as part of the evidence before him; but that, on the contrary, having weighed everything, including her sinking when she did, he was left in doubt. He then took recourse to the presumption which he supposed to persist as a determining legal factor. So far as we can see, that was the exact equivalent of putting the burden upon the Barge Company to prove that the barge was seaworthy.

The Molasses Company also argues that if the barge sank because her hatches were left open during the lading, she was not seaworthy for that reason. This wholly misapprehends our ruling in the *Fred E. Hasler*, 55 Fed. (2) 919, which merely applied the well-settled doctrine that a ship is unseaworthy, if, when she breaks ground, some part of her gear is not in place which her officers suppose to be in place. We did not decide that negligence of the crew in failing to attend to the gear during lading makes the ship [fol. 348] unseaworthy. Here the bargees deliberately kept the hatch covers unfastened, and if that was a fault, it was one of management.

Since therefore we think that the claimant did not prove its case, even if the clause in the charter regarding insurance did not cancel the warranty of seaworthiness, it is not necessary to pass upon that question.

Decree affirmed.

[fol. 349] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND  
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of August, one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

In the Matter of Petition of New York Tank Barge Corp.,  
for Limitation of Liability, as owner of Tank Barge "No.  
73", Commercial Molasses Corporation, Appellant

Appeal from the District Court of the United States for  
the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk, by A. M. Bell, Deputy Clerk.

[fol. 350] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Petition of New York Tank Barge Corp. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 20, 1940. D. E. Roberts, Clerk.

[fol. 351] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 351] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 16, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 44,933. U. S. Circuit Court of Appeals, Second Circuit, Term No. 584. Commercial Molasses Corporation, Petitioner, vs. New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 73", Petition for a writ of certiorari and exhibit thereto. Filed November 20, 1940. Term No. 584 O. T. 1940.

(2046)



IN THE  
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 103

In the Matter

of

THE PETITION OF NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",  
for Exoneration from or Limitation of Liability.

COMMERCIAL MORGAN ASSOCIATES CORPORATION,

Petitioner,

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner  
of the Tank Barge "T. N. No. 73",

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
AND BRIEF IN SUPPORT THEREOF.**

T. CATESBY JONES,

LEONARD J. MATTESON,

*Proctors for the Petitioner.*



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IN THE  
**Supreme Court of the United States**  
**OCTOBER TERM, 1940.**

No. \_\_\_\_\_

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In the Matter  
of \_\_\_\_\_

The Petition of NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",  
for Exoneration from or Limitation of Liability.

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner  
of the Tank Barge "T. N. No. 73",  
Respondent.

---

**Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Second Circuit.**

*To the Honorable The Chief Justice and the Associate  
Justices of the Supreme Court of the United States.*

The petition of Commercial Molasses Corporation,  
claimant for the loss of a cargo of molasses laden on  
board Tank Barge "No. 73", for a writ of certiorari  
to the United States Circuit Court of Appeals for the  
Second Circuit, respectfully shows:

**STATEMENT OF MATTER INVOLVED.**

This is a proceeding in admiralty instituted by New  
York Tank Barge Corporation, as chartered owner of

the Tank Barge "T. N. No. 73", when it filed a petition in the United States District Court for the Southern District of New York, praying for exoneration from, or limitation of, liability. The sole claimant in this proceeding, your petitioner, Commercial Molasses Corporation, filed claim to recover the value of its cargo of molasses laden on board the Tank Barge "T. N. No. 73" which was lost on October 27, 1937 when that vessel sank during loading.

Commercial Molasses Corporation, a New York corporation, had purchased a cargo of molasses from United Molasses Company, Limited, a British corporation (R. 183). This cargo had arrived on the S. S. "Athelsultan" which docked at Pier 1, Hoboken, New Jersey, prior to October 24, 1937, the date of this accident. New York Tank Barge Corporation, pursuant to the terms of a contract of affreightment with your petitioner (Ex. 6, R. 261; Edgs. 3 and 4, R. 306-7), furnished the barge "T. N. No. 73" to receive a portion of the cargo from the ship for carriage from Pier 1, Hoboken, to claimant's plant at Baldwin Avenue, Weehawken, New Jersey (Edg. 11, R. 308). On the evening of October 23, 1937 the "T. N. No. 73" was placed alongside the "Athelsultan", the discharge hose of the ship was coupled to the receiving equipment of the barge located about amidships, and the pumping of molasses from the ship began at 9.05 P. M.

The District Court found that when approximately 156,607 gallons of molasses (11.9 lbs. per gallon) had been pumped into the "T. N. No. 73" (Edg. 29, R. 316) the barge sank thus causing the loss and damage claimed.

There was no unusual condition of wind or weather to account for the sinking of the barge. In that situation the claimant cargo owner relied on the presumption of unseaworthiness resulting from the unexplained sinking of the barge and the warranty of seaworthiness in the

contract of carriage as the basis for recovery from the barge owner.

The barge owner attempted to rebut the presumption of unseaworthiness (1) by offering testimony of good condition of the barge and (2) by asserting that the sinking was due to the negligence of the mate of the barge in overloading the after tanks. The District Court held that the evidence on both points was insufficient.

#### FINDINGS AND CONCLUSIONS OF THE COURTS BELOW:

The Circuit Court of Appeals accepted the findings of the District Court (R. 341) and the findings of the Courts below were, therefore, concurrent. The two courts differed on questions of law.

#### THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS.

As to the loss being caused by negligence not associated with seaworthiness, the District Court said: "I do not find the evidence sufficient to establish this as a fact" (Fdg. 28, R. 316). The barge owner relied upon a witness, the mate of the barge, to establish negligence, but as to him the District Court found that his testimony was so unreliable that the Court was "left to sheer guesswork in attempting to draw any conclusions from this testimony" (Fdg. 30, R. 320, 321). As to the barge owner's explanation of the sinking through alleged overloading the District Court found that the barge owner's testimony was entirely unsatisfactory. The District Court said:

"After an examination of their computations I was of the opinion that their estimates and conclusions were not well founded and could not form a satisfactory basis for determining whether at the time

of the accident the after tanks had been overloaded, through the negligence of the mate of the barge" (Fdg. 35, R. 318).

With respect to the testimony of the shipowner's surveyors who examined the barge after she was raised, the District Court found:

"The barge was in such a battered condition after the salvage operations, that the inspections later made in drydock were necessarily inconclusive. All that could be said of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected" (Fdg. 25, R. 314).

The conclusions of the District Court were:

"1. When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, I find that this loss resulted from unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshored*, 290 F. 733; *The Calvert*, 51 F. (2d) 494 (R. 324).

"2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner of the right to limit liability to the value of the barge and her freight then pending" (R. 324).

The District Court then proceeded to hold against petitioner because in his opinion the barge owner's express

obligation to furnish a seaworthy vessel was overridden by another clause of the contract which required the cargo owner to procure insurance.

Your petitioner, the cargo owner, thereupon appealed to the Circuit Court of Appeals from that portion of the decree which exonerated the barge owner from liability under its interpretation of the insurance clause (R. 330). The barge owner filed cross-assignment of errors (R. 334) to that portion of the decision which held that the barge was unseaworthy and that limitation of liability should be denied.

#### THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals left undecided the question raised on your petitioner's appeal, although the presiding Judge stated during the oral argument that in his opinion your petitioner's appeal was well founded. No other conclusion is compatible with the Court's former decision in *Sanbern v. Wright & Cobb Lighterage Co.*, 171 Fed. 449, 454, *aff'd* (C. C. A. 2) 179 Fed. 1021. The Court stated in its opinion that its conclusion on the question of seaworthiness rendered it unnecessary to pass on the effect of the insurance provision of the charter (R. 345).

The Circuit Court of Appeals held that since your petitioner's cause of action is based on breach of warranty of seaworthiness "the promisee has the burden of proving the breach, by which we mean that, if the Judge is unable to make up his mind upon the issue, the promisee fails" (R. 341), that the cargo owner must "lay any doubts which remain when the whole evidence is in" (R. 344) and that since the District Court was unable on the evidence to ascertain the cause of the sinking, the District Judge erred in taking "recourse to the presumption

which he supposed to persist as a determining legal factor" (R. 345). This conclusion of the Circuit Court of Appeals is in square conflict with the decision of this Court in the *Edwin I. Morrison*, 153 U. S. 199. In that case this Court held at page 211:

"Perils of the sea were excepted by the charter party, but the *burden of the proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception*, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 438. *It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated.*"

This Court stated the question involved at page 212:

"In any aspect, the real point in controversy is, *did the respondents so far sustain the burden of proof which was upon them as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? If the determination of this question is left in doubt, that doubt must be resolved against them.*"

At page 215, this Court said:

"The obligation rested on the owners to make such inspection as would ascertain that the caps and plates

were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence.' *The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden*, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement."

"We are unwilling by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect of seaworthiness. *The Recsid*, 2 Sumner, 567, 574; *Douglas v. Seavall*, 4 Dow. H. L. 269." (All italics ours.)

The decision of the Circuit Court of Appeals is also in square conflict with the decision of this Court in *Schnell v. The Vallescura*, 293 U. S. 296, where this Court said at page 303:

"In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, *Carriage by Sea* (7th ed.) Chap. 1. The rule applies equally with respect to other exceptions for which the law permits him to stipulate. *Clark v. Barnwell*, 12 How. 272, 280; *Rich v. Lambert*, 12 How. 347, 357; *The Propeller Niagara v. Cordes*, 21 How. 7, 29; *The Maggie Hammond*, 9 Wall. 435, 459;

*The Edwin I. Morrison*, 153 U. S. 199, 211; *The Folmina*, 212 U. S. 354, 361. The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. *In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability.* See *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 184; *Chicago & Eastern Illinois R. Co. v. Collins Produce Co.*, 249 U. S. 186, 192, 193; *Railroad Co. v. Lockwood*, 17 Wall. 357, 379, 380." (Italics ours.)

The decision of the Circuit Court of Appeals is also in square conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *S. C. Loveland Co. v. Bethlehem Steel Co.*, (C. C. A. 3) 33 F. (2d) 655 where the Court said at page 657:

"A party rebutting the presumption [of unseaworthiness] must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affranchisement and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known, is a peril of the sea. *Work v. Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *The Queen* (D. C.), 78 F. 155; *Samborn v. Wright & Cobb Lighterage Co.* (D. C.), 171

F. 449; *Tucker Stevedoring Co. v. Southwark Manufacturing Co.* (C. C. A.), 24 F. (2d) 410." (Italics ours.)

The decision of the Circuit Court of Appeals is also in square conflict with the principles established by a long line of decisions by the Circuit Courts of Appeal in the Third, Fourth, Fifth and Ninth Circuits. Among these decisions are the following:

*The John Twohy* (C. C. A. 3), 279 Fed. 343, 344 (reversed on other grounds, 255 U. S. 77);

*Bank Line, Ltd. v. Porter* (C. C. A. 4), 25 F. (2d) 843, 845;

*Gardner, et al. v. Dantzler Lumber & Export Co., Inc.* (C. C. A. 5), 98 F. (2d) 478, 479;

*O. Y. Tonnage, A. B., et al. v. Texas Co.* (C. C. A. 5), 296 Fed. 893, 896;

*Pacific Coast S. S. Co. v. Bancroft-Whitney Co., et al.* (C. C. A. 9), 94 Fed. 180;

*The Babin Cherane* (C. C. A. 9), 208 Fed. 966, 973;

*The Indien* (C. C. A. 9), 71 F. (2d) 752, 755.

#### THE QUESTIONS PRESENTED.

The questions presented are:

1 (a) Whether the presumption of unseaworthiness, which arises in favor of a cargo owner when a vessel sinks in calm weather, continues after the vessel owner has failed to rebut the presumption by reliable evidence? In other words, whether the presumption persists only when no evidence whatever is offered in rebuttal and does not persist when the evidence offered is found to be "not reliable" and of such a nature as to leave the

Court to "sheer guesswork in attempting to draw any conclusions" (Fdg. 40, R. 320-1).

(b) Whether the presumption of unseaworthiness continues when the Court finds that the evidence offered to displace the presumption is "not sufficient" to establish negligence not associated with unseaworthiness (Fdg. 28, R. 316), which was the only cause for the sinking not connected with unseaworthiness suggested by the vessel owner, particularly where such evidence failed "to disclose the cause of the sinking" (Fdg. 25, R. 314)?

(c) Whether after such evidence is offered the cargo owner must by affirmative evidence establish unseaworthiness by precise and specific evidence of the nature thereof?

(2) Whether in such case the burden of proof is not on the vessel owner to establish that his vessel was in fact seaworthy?

(3) Whether the long line of decisions of this Court, and of the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits holding that the burden is on the vessel owner in such a case to establish seaworthiness of his vessel are now to be disregarded?

(4) Whether owners of goods are to be required to insure against a vessel owner's negligence in failing to provide a seaworthy ship.

#### REASONS FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the Circuit Court of Appeals of the Second Circuit in this case is in square conflict with the decision of this Court in *The Edwin I. Morrison*, 153 U. S. 199, and *The Vallescura*, 293 U. S. 296.

(2) The decision of the Circuit Court of Appeals for the Second Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *S. C. Loveland v. Bethlehem Steel Company*, 33 F. (2d) 655, and with the decisions in the Third, Fourth, Fifth and Ninth Circuits.

(3) The decision is of great importance to the merchants and insurers and other persons interested in goods carried by water. It relaxes "the important and salutary rule in respect of seaworthiness" by resorting "to mere conjecture as to the cause of" sinking of a vessel. Thus the Circuit Court of Appeals has overruled a principle of law laid down by this Court more than forty years ago in *The Edwin I. Morrison*, 153 U. S. 199, 215. It offers no valid reason for placing a burden of explanation on a shipper of goods when the carrier is, or should be, in possession of the facts. It suggests no valid reason for departing from "an important and salutary rule" which this Court has persistently refused to relax. *The Edwin I. Morrison*, 153 U. S. 199, 215. *The Vallescura*, 293 U. S. 296, 303.

(4) The relations between cargo shippers and vessel owners should not be made uncertain, and the law to be applied by Courts of Admiralty in each of the circuits should be uniform. If the decision of the Circuit Court of Appeals in this case is not reversed by this court that law will be left in uncertainty and confusion and the law in the various circuits will not be uniform.

(5) The decision of the District Court that a provision requiring a cargo owner to insure is sufficient to relieve a shipowner of the warranty of seaworthiness is unsound and not in harmony with the decision of this Court in *Callen Fuel Co. v. Hedger*, 290 U. S. 82.

WHEREFORE, petitioner prays that this court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit directing it to send to this court for review a full transcript of the record in the said Circuit Court of Appeals in the case entitled: *In the Matter of the Petition of New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 73", for Exoneration from or Limitation of Liability, Petitioner-Appellee, Commercial Molasses Corporation, Claimant-Appellant*, October Term 1939, No. 331 and that the decision of the said Circuit Court of Appeals rendered on the 30th day of July, 1940 (R., p. 330) and the order entered on the 20th day of August, 1940 (R. 346), be reversed, and for such further relief in the premises as may be just.

Dated, New York, November 18, 1940.

COMMERCIAL MOLASSES CORPORATION,

*Petitioner.*

By T. CATESBY JONES,

LEONARD J. MATTESON,

*Proctors for Petitioner.*

IN THE  
**Supreme Court of the United States**  
**OCTOBER TERM, 1940.**

No. \_\_\_\_\_

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In the Matter

of

The Petition of NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",  
for Exoneration from or Limitation of Liability.

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner  
of the Tank Barge "T. N. No. 73",

Respondent.

**BRIEF FOR PETITIONER.**

***Opinions Below.***

The opinion of the District Court is not officially reported but is unofficially reported at 1939 A. M. C. 673 and printed in the record (R. 281). The findings of fact and conclusions of law of the District Court are printed in the record (R. 306).

The opinion of the Circuit Court of Appeals is officially reported 114 F. (2d) 248 and printed in the record (R. 339).

***Jurisdiction of This Court.***

This is an admiralty proceeding instituted by the New York Tank Barge Corporation, as chartered owner of the

Tank Barge "T. N. No. 73", by a petition for limitation of or exoneration from liability for damages resulting from the sinking of the barge "T. N. No. 73" at Pier 1, Hoboken, New Jersey, on October 24, 1937. The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, 28 U. S. C. A. 5347.

### ***The Facts.***

The facts are stated in the petition and will not be repeated here.

### **POINT I.**

**The decision of the Circuit Court of Appeals is in square conflict with decisions of this Court, notably *The Edwin I. Morrison*, 153 U. S. 199, in that it approves the resort to mere conjecture as to the cause of the sinking as a defense to the shipowner and by such conjecture throws upon a cargo owner the burden to show unseaworthiness. In so doing the Court has relaxed "the important and salutary rule in respect of seaworthiness" which this Court has repeatedly said should not be done.**

Your petitioner's case rests solely on breach of the warranty of seaworthiness. We concede that the effect of the insurance clause in the contract of carriage in this case (R. 263, 322) is to release the carrier from liability for mere negligence other than failure to supply a seaworthy vessel. Negligence, as thus defined, is an excepted peril in the contract of carriage.

In the District Court the vessel owner attempted to bring itself within this exception but failed in the necessary proof (Fdg. 28, R. 316; Fdg. 35, R. 318). Never

theless, the Circuit Court of Appeals in this case held that, although the cargo owner at the outset had the benefit of a presumption of unseaworthiness since the vessel sank in calm water without apparent cause other than unseaworthiness to account for the sinking, this presumption did not "persist" after the vessel owner had offered proof to rebut the presumption, even though that proof was "not reliable", left the Court "to sheer guesswork" (Fdg. 40, R. 320-321), was not sufficient to establish a cause for the sinking other than unseaworthiness (Fdg. 28, R. 316) and failed "to disclose the cause of the sinking" (Fdg. 25, R. 314). The Circuit Court of Appeals concurred in the findings of the District Court, but nevertheless, held that the cargo owner must in these circumstances show unseaworthiness specifically. It therefore reversed the decision of the District Court on the ground that it was error for the District Court to take "recourse to the presumption which he supposed to persist as a determining legal factor" (R. 345).

The decision of the Circuit Court of Appeals is in square conflict with the decision of this Court in *The Edwin I. Morrison*, 153 U. S. 199. The facts in *The Edwin I. Morrison* did not involve a sinking but an admission of seawater to a cargo hold because a cap and plate covering the bilge pump hole became displaced. The cause of the displacement of the cap and plate was not known although it was shown that the vessel had encountered heavy weather which, however, was not so severe as to disturb the cap and plate if it had been sufficiently secured. On this state of the facts this Court stated the rule in precisely opposite terms from those used below. This Court said:

"Perils of the sea were excepted by the charter party, but the *burden of the proof was on the re-*

*spondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 438. It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated." The Edwin I. Morrison, 153 U. S. 199, 211.*

\* \* \*

"In any aspect, the real point in controversy is, *did the respondents so far sustain the burden of proof which was upon them as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? If the determination of this question is left in doubt, that doubt must be resolved against them.*" *The Edwin I. Morrison, 153 U. S. 199, 212.*

\* \* \*

"If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached might follow, but we are of opinion that precisely here respondents failed in their case." *The Edwin I. Morrison, 153 U. S. 199, 214.*

\* \* \*

"The obligation rested on the owners to make such

inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact 'did not depend on their knowledge or ignorance, their care or negligence.' *The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden,* even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement.

*We are unwilling, by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect of seaworthiness. The Recside, 2 Sumner, 567, 574; Douglas v. Seougal, 4 Dow, H. L. 269." The Edwin I. Morrison, 153 U. S. 199, 215. (Italics ours.)*

*The Edwin I. Morrison, supra*, has been uniformly followed and applied in many decisions of this court.

*Schnell v. The Vallescura*, 293 U. S. 296, 304;

*The Wildcroft*, 201 U. S. 378, 389;

*The Southwark*, 191 U. S. 1, 6, 12;

*International Navigation Co. v. Farr*, 181 U. S. 218, 226;

*The Irrawaddy*, 171 U. S. 187, 190;

*The Caledonia*, 157 U. S. 124.

The principle established by *The Edwin I. Morrison*, that the burden of proof lies upon the vessel owner to prove the seaworthiness of the vessel supplied for the carriage of cargo and that any doubts must be resolved against the vessel owner, has been repeatedly applied in the various Circuits.

## POINT II.

**The decision of the Circuit Court of Appeals is in square conflict with the decisions of the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits.**

*For conflict with the Circuit Court of Appeals for the Third Circuit, see S. C. Loveland Co. v. Bethlehem Steel Co., 33 F. (2d) 655.* The legal situation in that case was the same as that which existed here. There the vessel owner was not a common carrier and the cargo owner relied not on the presumption of negligence arising out of the bailment but on the presumption of unseaworthiness arising from the unexplained sinking of the vessel. The Circuit Court of Appeals for the Third Circuit held that the presumption of unseaworthiness could not be met "by merely showing such a state of facts that the Court is unable to discover how the disaster occurred" and that when this situation resulted from the vessel owners' proof, the presumption nevertheless persisted and was a proper basis for finding the vessel unseaworthy. The Court said at page 657:

"The Loveland Company, thus confronted by the presumption and being driven to rebut it, set about the task of proving the lighter's seaworthiness. This became purely an issue of fact. \* \* \* Evidence of previous good condition has some probative value and therefore is admissible in rebutting the presumption of unseaworthiness, but clearly it is not enough alone. A party rebutting the presumption must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster oc-

curred, or that it might have occurred from something which, if only it were known, is a peril of the sea; *Work v. Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *The Queen* (D. C.), 78 F. 155; *Saunders v. Wright & Cobb Lighterage Co.* (D. C.), 171 F. 449; *Tucker Stevedoring Co. v. Southwark Manufacturing Co.* (C. C. A.), 24 F. (2d) 410."

The Court in the *Lorland* case said at page 656:

"There is no occasion to discuss and cite authorities for the presumption of unseaworthiness of a vessel which the law raises when she sinks without any known cause."

The Court cited *The Arctic Bird* (D. C. Cal.), 109 Fed. 167, and referred to the opinion of this Court in *DuPont de Nemours v. Vance*, 19 How. 162, as quoted in that case.

The Circuit Court of Appeals for the Second Circuit in the present case criticised the quotation from *DuPont v. Vance*, by the Circuit Court of Appeals for the Third Circuit in *S. C. Lorland Co. v. Bethlehem Steel Co.*, 33 F. (2d) 655, as erroneous (R. 343), and pointed out that the erroneous quotation originated in the opinion in the *Oregon Round Lumber Co. v. Portland & A. S. S. Co.*, 162 Fed. 912, 921, where the Court misplaced quotation marks in quoting from the opinion in *The Arctic Bird*. The only effect of this error is that what purports to be a quotation from *DuPont v. Vance* is in fact a paraphrase from this Court's opinion in *Work v. Leathers*, 97 U. S. 379, 380, which is also directly and correctly quoted in the same opinion, *Oregon Round Lumber Co. v. Portland & A. S. S. Co.*, 162 Fed. 912, 921. We submit that this criticism by one Circuit Court of Appeals of another creates just that sort of confusion in the law that a

writ of certiorari from this Court was intended to correct.

- After the Circuit Court of Appeals cited some sixteen cases which uniformly held that the unexplained sinking of a vessel raises the presumption of unseaworthiness, it proceeded to say that such a presumption did not necessarily mean that it was for the shipowner to "persuade the Court of the ship's seaworthiness" (R. 343). We submit that none of the cases cited by the Circuit Court of Appeals gives the slightest support for the view that the burden was not upon the shipowner to persuade the Court of the ship's seaworthiness. Indeed, many of them state the contrary. When the Circuit Court of Appeals was confronted with one of its former decisions—*The Harper No. 145*, 42 F. (2d) 161, where it had held that "The owner has the burden of proving its barge was seaworthy when the chalk was loaded", that Court contented itself by saying: "It is impossible to be sure that we meant more than" that the presumption of unseaworthiness arising in such case results in shifting of the "burden of going forward with the evidence" (R. 344). Such a view of the law is sharply in conflict with the views of the Third Circuit in *S. C. Loveland Co. v. Bethlehem Steel Co.*, 33 F. (2d) 655, at page 657:

"A party rebutting the presumption must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known, is a peril of the sea."

In the Third Circuit, preceding the decision in *S. C. Loveland Co. v. Bethlehem Steel Co.*, *supra*, that Court, in the case of *The John Twohy* (C. C. A. 3) 279 Fed. 343, 344 (reversed on other grounds 255 U. S. 77), held:

"The libellant's first claim is for damages to the cargo. The schooner's liability arises from her warranty of seaworthiness, *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, under the obligation of shipowners to provide a seaworthy vessel unless by the terms of the charter-party they limit their obligation to the exercise of due care to make her so. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. There was nothing in the charter-party limiting this obligation. *Therefore the burden of affirmatively proving her seaworthiness at the commencement of the voyage, as well as sustaining the defense that the damage to the cargo was due to perils of the sea within exceptions of the charter-party and bill-of-lading, rests upon the owners. International Navigation Co. v. Farr & Bailey Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *The Wildcroft, supra*. We find the owners have not sustained this burden." (Italics ours.)

*For conflict with the Circuit Court of Appeals for the Fourth Circuit, see Bank Line Ltd. v. Porter*, 25 F. (2d) 843, 845.

In *Bank Line, Ltd. v. Porter*, 25 F. (2d) 843, 845, the Court said: "If there is any doubt as to the seaworthiness of the vessel, that doubt 'must be resolved against the shipowner and in favor of the shipper'. *The Southwark*, 191 U. S. 1." Here the Circuit Court of Appeals for the Second Circuit says that the doubt must be resolved in favor of the shipowner.

*For conflict with the Circuit Court of Appeals for the Fifth Circuit, see Gardner v. Dantzler Lumber & Export Co., Inc., 98 F. (2d) 478, 479, where the Court said: "The burden was on the respondents [vessel owners] to prove she was seaworthy."*

The Circuit Court of Appeals for the Fifth Circuit uniformly places the burden on the shipowner. It has not only done so in *Gardner v. Dantzler Lumber & Export Co., Inc.*, 98 F. (2d) 478, 479, but also in *O. Y. Tonnage, A. B., v. Texas Co.*, 296 Fed. 893, 896, and in *Compania Naviera Mexicana, S. A. v. Spool* (C. C. A. 5) 11 F. (2d) 777.

*For conflict with the Circuit Court of Appeals for the Ninth Circuit, see Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180. In that case the Circuit Court of Appeals for the Fifth Circuit applied the principles of *The Edwin I. Morrison, supra*. The situation in that case was similar to that presented here in that the attempted explanation of the respondent vessel owner failed to disclose the cause of the damage. The Court pointed out that this led to an inference that the facts had not been fully disclosed. The Court adopted the language of Judge Hoffman in *The Compta* (D. C. Cal.) 4 Sawy. 375, Fed. Cas. No. 3069. The Circuit Court of Appeals for the Ninth Circuit said at page 200:

"The broad statement is clearly made that it is the duty of the owner, in order to relieve himself, 'to show that the damage arose from a sea peril'. It necessarily follows that, if such facts are known to him, he must prove them. 'It is not enough for him to show that it might have arisen from that cause. He must prove that it did.' If the facts are known to him then the other methods of proof suggested by Judge Hoffman may be resorted to--their suf-

ficiency, of course, to be determined by the court. Common sense and sound reason appeal strongly to the conscience of the court, against the adoption of any rule that would allow the claimant to withhold the facts within his knowledge, and rely solely on the theory of presumption."

The Court then summarized the decision of this Court in *The Edwin I. Morrison*, *supra*, and reached the following conclusion:

"Upon all the evidence contained in the record, we are of opinion that the court did not err in its conclusion that *the burden of proof rested upon the claimant to show that the leak, which was the direct cause which led to the damage of the goods by seawater, occurred by the danger of the sea*, and that in the absence of any such proof the presumption of the law is that the damage was occasioned either from the unseaworthiness of the steamer, or from the carelessness or negligence of the officers and crew on board. In either event the claimant and the steamer would be liable." (Italics ours.)

In the case of *The Babin Cherage* (C. C. A. 9), 208 Fed. 966, the same Court said at page 973:

"Where damage to cargo has been sustained by admission of seawater into the ship during the voyage, and this fact is established, *the byrden is cast upon the owner, under a charter party such as has been entered into here, to show not only seaworthiness, but that the cause of damage is attributable to perils of the sea, such as come within the purview of the stipulated exceptions*. This proposition we understand to be fully conceded by proctors for appellees." (Italics ours.)

In the case of *The Indira* (C. C. A. 9), 71 F. (2d) 752, at page 755, the same Court said:

*"At the outset, it must be borne in mind that the burden of proving the vessel's seaworthiness rest upon the shipowner. Any doubt must be resolved against him, 'with the presumption in favor of the appellee that it was the fault of the appellant.' The Jeannie* (C. C. A. 9), 236 F. 463, 470." (Italics ours.)

It is clear from these cases from the Third, Fourth, Fifth and Ninth Circuits that the present decision is out of line with these Circuits and that there is, since the present decision came down, a sharp conflict between the Circuits. Indeed, in order to secure any judicial approval of its position, the Circuit Court of Appeals for the Second Circuit in this case has had to resort to English cases.

The English cases cited in the opinion of the Circuit Court of Appeals establish no different rule from that applied in the Third, Fourth, Fifth and Ninth Circuits. *Watson v. Clark*, 1 Dow, 336, was an action on a policy of insurance. The defense as to the warranty in a policy of insurance is on the insurer who seeks to avoid his contract, as it is also on the carrier who fails to perform his contract. Nevertheless it was held that a presumption of unseaworthiness arose where the vessel leaked badly immediately after sailing and that "the *onus probandi*, in such a case, rested with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage" (p. 344). *Pickup v. Thames Insurance Co.*, L. R. 3 Q. B. 594 (1878) was a similar case involving instructions to the jury as the trier of the facts. In that case the ship had been at sea eleven days before the disability arose and there was a question for the

jury as to whether any inference was to be drawn from this circumstance. *Ajam Goolam Hossen & Co. v. Union Marine Ins. Co.* (1901), A. C. 362 was also an action on an insurance policy. The Court held that the presumption of unseaworthiness was to be considered with other circumstances developed by the testimony, *i. e.*, offered in rebuttal. The substance of the decision in *Lindsey v. Klein*, 1911 A. C. 194 is no more than that when those alleging unseaworthiness show that the vessel foundered or broke down "shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may, of course, be overcome by proof that the loss or damage to the vessel occurred from a cause or causes of a different character" (p. 205). The decision in this case was commented upon by the Circuit Court of Appeals for the Second Circuit in *Societa Anonima Cantiera Oliva v. Fed. Ins. Co.*, 62 F. (2) 769, at page 771, in the following language:

"Some of the language in *Klein v. Lindsey*, L. R. (1911) A. C. 194, seems to look the other way, but we are not clear just what was the final conclusion. Lord Shaw said that normally the burden was on the cargo to prove unseaworthiness, though breakdown of machinery soon after breaking ground, coupled with the ship's history, in that case turned the scale. At the same time he quoted with apparent approval the language of the Lord Ordinary below, to the effect that a breakdown under ordinary use shifted the burden of proof back upon the ship" (p. 771).

Irrespective of the looseness of the language used, it is clear that the presumption of unseaworthiness in that case was the basis of the finding that the ship was, in fact, unseaworthy.

We respectfully submit that the present decision in the Second Circuit, where a large number of Admiralty cases are tried, conflicts so completely with the decisions of the Third, Fourth, Fifth and Ninth Circuits, that confusion is certain to result. Moreover, if the present decision is not reversed it will relax the "important and salutary rule with respect to seaworthiness" which this Court in *The Edwin I. Morrison*, 153 U. S. 119, felt should be maintained. For these reasons we respectfully urge that the decision below should be reviewed by this Court. Otherwise the law in the various circuits cannot be reconciled and there will be a want of uniformity in the Admiralty Law which will work great harm.

### POINT III.

**The decision of the District Court excusing the vessel owner from its obligation to furnish a seaworthy ship by reason of the agreement of the cargo owner to obtain insurance was clearly incorrect and should have been reviewed and reversed by the Circuit Court of Appeals.**

A warranty of seaworthiness exists in insurance policies, as well as in contracts of affreightment, and a contract to insure does not involve a contract to insure against a shipowner's own failure to see that his vessel is seaworthy; for if it did the goods owner might find himself without a remedy against his insurer as well as against the carrier.

The contract to obtain insurance cannot be interpreted to mean insurance against loss from any possible cause.

*The Titania*, 19 Fed. 101, 104;

*The Egypt*, 25 Fed. 320, 329.

A policy of insurance on cargo is subject to an implied warranty of seaworthiness exactly as is a policy of insurance on a vessel. Arnold on Marine Insurance, 11th Ed., Sec. 689, p. 899.

An insurance policy does not ordinarily insure against a loss by reason of unseaworthiness.

*New Orleans T. & M. Ry. Co. v. Union Marine Ins. Co., Ltd.* (C. C. A. 5), 286 Fed. 32;

*Carg v. Home Ins. Co.*, 235 N. Y. 296, 301.

In this case the warranty of seaworthiness was express, placed at the beginning of the contract of carriage (R. 262). The subsequent provision with respect to insurance (R. 263) contains no express reference to the preceding provision nor any express modification of the obligation assumed to provide a seaworthy vessel. It was clearly not intended to modify or override the express obligation of the vessel owner to furnish a seaworthy vessel.

In the case of *The Caladonia*, 157 U. S. 124, at page 137, this Court said:

"As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do *not in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel.* *Steel v. State Line Steamship Company*, 3 App. Cas. 72; *Gilroy v. Price*, App. Cas. (1893) 56; *The Glenfruin*, 10 P. D. 103; *Kapitoff v. Wilson*, 1 Q. B. D. 377; *Tattersall v. National Steamship Company*, 12 Q. B. D. 297; *Thames & Mersey Ins. Company v. Hamilton*, 12 App. Cas. 484, 490. *If the exceptions are capable of, they ought to receive, to*

use the language of Lord Selborne in *Steel v. Steamship Company*, "a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken." (Italics ours.)

Again in the *Carib Prince*, 170 U. S. 655, at 659, this Court said:

"In other words, that where the owner desires the exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally so contract." (Italics ours.)

In the case of *Callen Fuel Co. v. W. E. Hedger*, 290 U. S. 82 at 88, this Court said:

"The warranty of seaworthiness is implied from the circumstances of the parties and the subject-matter of the contract and may be negated only by express covenant." (Italics ours.)

*The Framlington Court* (C. C. A. 5), 69 F. (2d) 300.

The provision with respect to insurance should not receive an interpretation nullifying the express agreement of the shipowner to furnish a seaworthy vessel. The two clauses should be read together and given an interpretation giving reasonable effect to both.

*Cliff v. DuPont*, 298 Fed. 649, 652;

*United States v. A. Bentley & Sons Co.*, 293 Fed. 229, 242.

This principle requires a limitation of the effect of the insurance provision to losses due to other causes than unseaworthiness, for instance, negligence not connected with unseaworthiness.

The insurance provision does not excuse the vessel owner from his express obligation to furnish a seaworthy vessel. *Sanbern v. Wright & Cobb Lighterage Co.*, 171 Fed. 449, 454, aff'd (C. C. A. 2) 179 Fed. 1021. The House of Lords took this view of the matter in the English case of *James Nelson & Sons, Ltd. v. Nelson Line, Ltd.*, 1908 A. C. 16, 19, affirming the decision of the Court of Appeals to the same effect 1907, 1 K. B. 769, 779, 782.

### CONCLUSION.

***Because the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court and the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits; because the decision is on an important principle of Maritime Law of wide application affecting every contract for the carriage of goods by water, and because the necessity for uniformity among the circuits in the Admiralty Law as administered by them has been repeatedly recognized by this Court, we respectfully submit that a writ of certiorari should be granted in order that the questions presented herein may be definitely and finally decided.***

Respectfully submitted,

T. CATESBY JONES,

LEONARD J. MATTESON,

*Proctors for Petitioner.*



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1940.

No. 584.

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In the Matter

of

1. Petition of NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",  
for Exoneration from or Limitation of Liability.

COMMERCIAL MOLASSES CORPORATION,

Petitioner,

(Claimant below),

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner  
of the Tank Barge "T. N. No. 73",

Respondent,

(Petitioner below).

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**REPLY BRIEF FOR PETITIONER.**

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T. CATESBY JONES,

LEONARD J. MATTESON,

*Proctors for Petitioner.*

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IN THE  
**Supreme Court of the United States**  
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The Petition of NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",  
for Exoneration from or Limitation of Liability.

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COMMERCIAL MOLASSES CORPORATION,

Petitioner,  
(Claimant below),

v.

NEW YORK TANK BARGE CORPORATION, as chartered owner  
of the Tank Barge "T. N. No. 73",

Respondent,  
(Petitioner below).

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**REPLY BRIEF FOR PETITIONER.**

The respondent, New York Tank Barge Corporation (petitioner below), has filed a brief in opposition to the petition of Commercial Molasses Corporation for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in which by many references to testimony and some references to the Findings of Fact, an effort is made to have it appear that only a question of fact has been presented to this Court by your petitioner.

At page 3 of respondent's brief, it is said:

"\* \* \* before receiving any molasses she was inspected not only by respondent's assistant superintendent, but also by a representative of cargo interests, and was found to be clean, fit, and tight, with no leaks, cargo's representative admitting that the tanks 'were dry and clean' (Edgs. 10, 26; R. 308, 314; R. 37, 39, 65, 71, 174-176, 192, 197, 198, 228)."

The findings Nos. 10 and 26 do not support this statement. Finding 10, R. 208, is as follows:

"10. The barge was used for the carriage of molasses and vegetable oils in and about New York Harbor. Petitioner, on numerous occasions, had thus carried molasses for the claimant."

The relevant portion of Finding 26 is as follows:

"26. \* \* \* Before the loading commenced an examination was made by a representative of the cargo interests and he pronounced her clean and fit for loading."

There is no finding that the boat was "tight and with no leaks".

On the contrary the court found as a fact on the state of the record that the loss resulted from unseaworthiness:

"\* \* \* I find that this loss resulted from unseaworthiness" (Con. 1, R. 324).

At page 7, the following statement appears:

"After careful consideration of the record, the trial judge found that 'the best that can be said

of the state of the record is that the cause of the accident has been left in doubt' (R. 295; Con. 2, R. 324)."

On the contrary, the District Judge found that the presumption or inference of unseaworthiness had not been rebutted and that therefore the factual inference from the evidence was that the loss resulted from unseaworthiness:

"1. When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, *I find that this loss resulted from unseaworthiness. The Emergency*, 9 F. Supp. 484; *The Jungshored*, 290 F. 733; *The Calvert*, 51 F. (2d) 494" (R. 324; Con. 1, R. 324). (Italics ours.)

The quotation in respondent's brief is from Conclusion 2 where the Court, in commenting upon respondent's argument, said:

"2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner of the right to limit liability to the value of the barge and her freight then pending" (Con. 2, R. 324).

Obviously this is not a finding.

Nor is there a finding that "cargo's representative" admitted "that the 'tanks were dry and clean'" as is stated in respondent's brief. The person referred to by the respondent was not a representative of Commercial Molasses Corporation, your petitioner, but

was the representative of United Molasses Company, vendors from whom your petitioner purchased the cargo (R. 192). His inspection was only of the tanks for cleanliness (R. 197).

At page 4 of respondent's brief, reference is made to Finding 33 of the trial Judge and the calculations based on expert testimony introduced by the respondent. The weight accorded these figures by the District Judge is set forth in Finding 35 (R. 318):

"35. Petitioner produced, at the trial, certain experts who endeavored to figure the disposition of the load as between the forward and after tanks, at the time the barge sank. After an examination of their computations I was of the opinion that their estimates and conclusions were not well founded and could not form a satisfactory basis for determining whether at the time of the accident the after tanks had been overloaded, through the negligence of the mate of the barge."

Again on page 4, the statement is made:

"The diver who subsequently took part in the raising of the barge found no evidence of leakage when he examined the barge (Edgs. 21, R. 312, 313)."

In finding 21, it appears that the diver testified:

"that he found the barge lying about two-thirds submerged in the mud and canted over on one side at an angle of about 45 degrees" (Edg. 21, R. 312, 313).

In addition to being submerged in the mud, the barge was totally submerged in water of the slip when the

examination was made (R. 246, 247). Consequently the leakage could not possibly have been determined if it had existed.

At page 6 of respondent's brief, a statement is made with respect to the requirements of proof of lack of privity or knowledge by the respondent (Petitioner in the Court below). The lack of privity or knowledge of the respondent as a petitioner for limitation of liability is not an issue in this case for the respondent's contract with your petitioner was a personal contract making respondent liable for breach of warranty of seaworthiness without benefit of limitation of liability, irrespective of proof of lack of privity or knowledge.

*Pendleton v. Benner Lines*, 246 U. S. 353;  
*Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82.

At page 9 of respondent's brief, it is stated that:

"The basic question is whether your petitioner can escape its admitted and unexplained breach of its contractual agreement to procure insurance for the account of your respondent and to release your respondent in the event of such a breach."

The Circuit Court of Appeals did not base its decision on this issue and did not even consider the argument with respect to it (R. 345). That Court said:

"Since therefore we think that the claimant did not prove its case, even if the clause in the charter regarding insurance did not cancel the warranty of seaworthiness, it is not necessary to pass on that question" (R. 345).

The decision of the Circuit Court of Appeals was based entirely on the question of the burden of proof of seaworthiness or unseaworthiness as stated in the petition and brief in support thereof. On that question, we submit the decision of the Circuit Court of Appeals was in conflict with the decision of this court in *The Edwin I. Morrison*, 153 U. S. 199, and also in conflict with the decisions in the other circuits, *S. C. Loveland Co. v. Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655, and cases cited in the brief in support of the petition, pages 18-24.

The basic question stated by the respondent was not decided by the Circuit Court of Appeals. The decision of the District Court on that point was clearly wrong (Brief in Support of Petition, pp. 26-29).

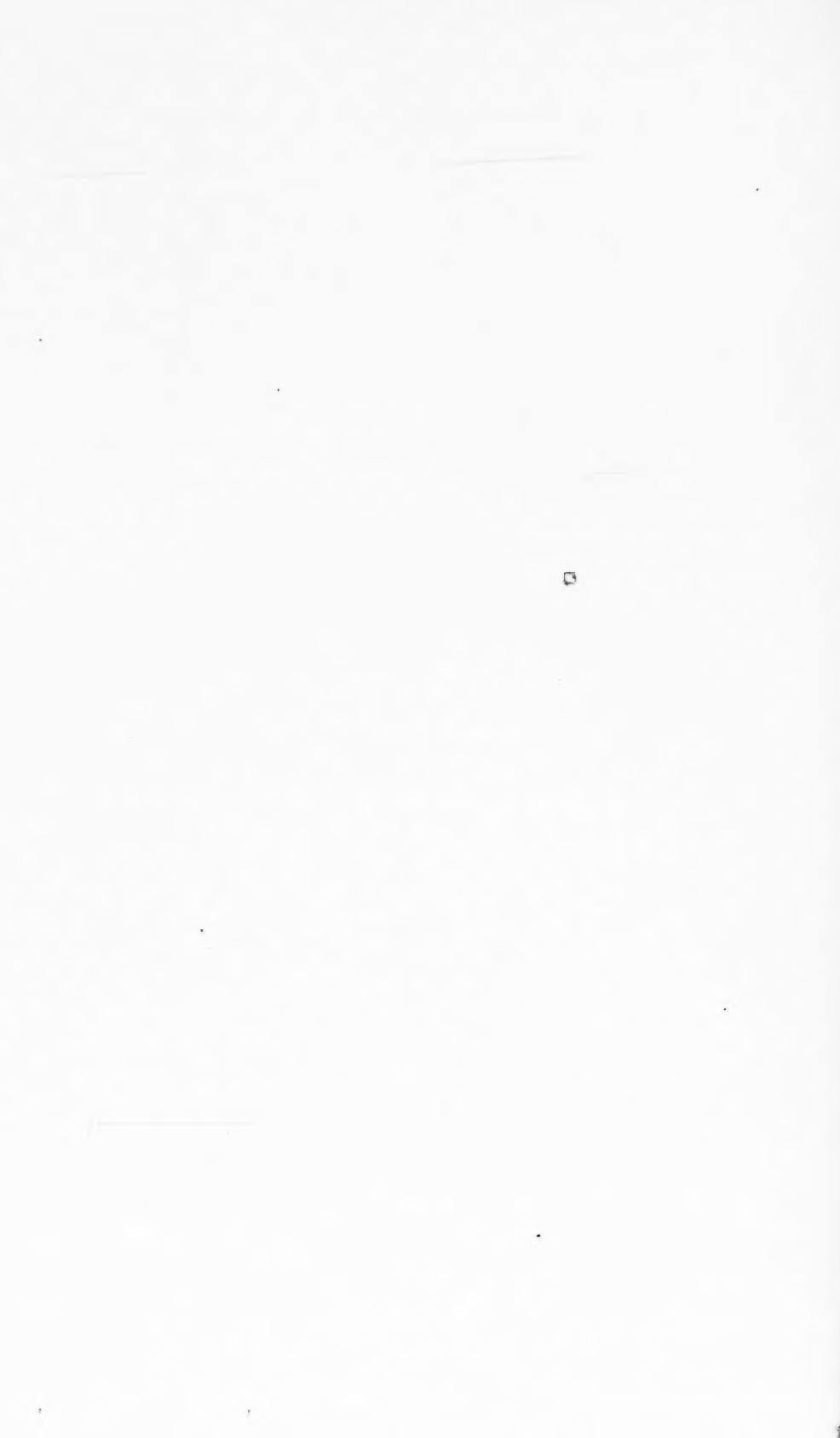
*Sanborn v. Wright & Cobb Lighterage Co.*,  
171 Fed. 449, 454.

We would not have burdened this Court with a further brief in this case, but for respondent's disregard of the findings below. On the findings below, the importance of the questions presented is manifest.

Respectfully submitted,

T. CATESBY JONES,  
LEONARD J. MATTESON,  
*Proctors for Petitioner.*





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**Supreme Court of the United States**

OCTOBER TERM, 1940

No. 584

14

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COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

*vs.*

NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

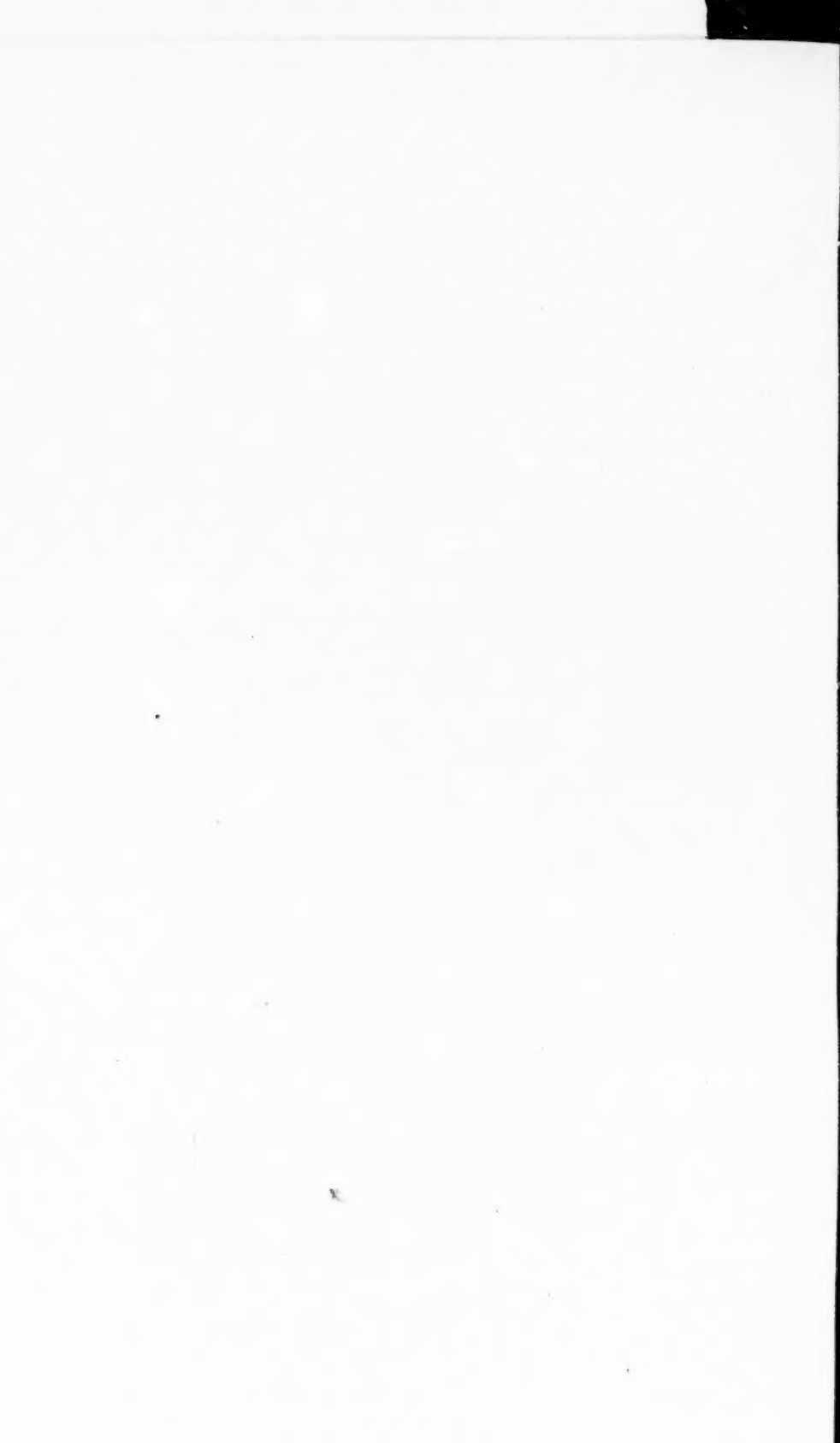
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**BRIEF ON BEHALF OF PETITIONER**

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D. ROGER ENGLAR,  
T. CATESBY JONES,  
LEONARD J. MATTESON,  
EZRA G. BENEDICT FOX,  
*Counsel for Petitioner.*

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IV—A shipowner can and must know at his own peril the condition of the vessel in which he proposes to carry the goods of other people; while the cargo owner is under no obligation to look after such matter. Hence the burden of proving that the vessel was in fact seaworthy rests upon the vessel owner and he must lay any doubts as to her fitness to perform the voyage which he had undertaken that she would perform safely.....	29
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# Supreme Court of the United States

OCTOBER TERM, 1940

No. 584

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COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

*vs.*

NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF ON BEHALF OF PETITIONER

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### Opinions Below

The opinion of the District Court is not officially reported. It is unofficially reported, however, in 1939 A.M.C. 673, and is printed in the Record (R. 246-264). Findings of Fact by the District Court, numbered from 1 to 47, with Conclusions of Law, numbered from 1 to 15, are also printed in the Record (R. 266-285). The opinion of the Circuit Court of Appeals is officially reported at 114 F. (2d) 248 and is printed in the record (R. 291-297).

## **Jurisdiction of This Court**

This is a proceeding in Admiralty instituted in the United States District Court for the Southern District of New York by the New York Tank Barge Corporation (hereinafter referred to as respondent),\* as chartered owner of the Tank Barge "T. N. No. 73," for limitation of or exoneration from liability for damages to a shipment of molasses resulting from the sinking of the barge "T. N. No. 73" at Pier 1, Hoboken, N. J., on October 24, 1937. On December 16, 1940 this Court granted certiorari on the petition of Commercial Molasses Corporation, the sole claimant in the limitation proceeding below (hereinafter referred to as petitioner) (R. 299). The jurisdiction of this Court is under Section 240 of the Judicial Code as amended by Act of February 13, 1925, U. S. Code, Title 28, Section 347, and under Article 3, Section 2, Clause 1, of the Constitution of the United States.

## **Statement of the Matter Involved**

Your petitioner, as owner of the molasses, filed its claim in the limitation proceedings claiming damages for the loss of molasses which had been brought to Hoboken, New Jersey, by the M. V. "Athelsultan," and which was being delivered by that vessel to the barge "T. N. No. 73." While the loading of the barge was in progress, the barge sank in smooth water without any external contact with any other vessel or object to account for the sinking.

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\* Because the proceedings below were instituted by a petition for limitation of liability, respondent in this court was in the lower courts designated and there referred to as the petitioner; whereas your petitioner on certiorari was there designated and referred to as claimant.

Your petitioner had a contract of affreightment with respondent for the carriage of molasses from vessel in New York harbor to petitioner's plant\* (Finding 3, R. 266). The carriage involved in the instant case was under that contract. This contract contained an express warranty of seaworthiness (Finding 42, R. 278), and also a provision requiring petitioner to take out insurance for the account of respondent (Finding 43, R. 278).

The insurance which petitioner had on the cargo, was taken out by the United Molasses Company, Ltd., from whom the petitioner purchased the cargo "to be delivered by that company c. i. f. at a United States port into shore tanks or barges provided by the purchaser" (R. 162; Finding 44, R. 279). The insurance on the cargo did not inure to the benefit of the respondent (Finding 45, R. 279). On the contrary, it contained warranties that it should be free from liability to any carrier (Finding 44, R. 279):

"It was stipulated at the trial that the claim of the Commercial Molasses Corporation herein, was made on behalf of the underwriters, who wrote the insurance for the United Molasses Co., Ltd. The Commercial Molasses Corporation was credited by United Molasses Co., Ltd. on account of the purchase price of the molasses, with the amount allowed for the loss by the underwriters. The claimant's losses were thus settled by the underwriters for the vendor, United Molasses Co., Ltd. Presumably the amounts credited to the claimant, equalled the loans of the underwriters to the United Molasses Co., Ltd., as provided for in the aforementioned clauses of the insurance policies" (Finding 46, R. 280).

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\* The contract of affreightment with respondent was originally made by Dunbar Molasses Corporation, but petitioner had assumed it (Finding 3, R. 266).

Pursuant to the contract between petitioner and respondent, your petitioner notified respondent of the arrival of the M/V "Athelsultan" at Pier 1, Hoboken, New Jersey, laden with a cargo of molasses consigned to petitioner. Whereupon, on the evening of October 23, 1937, respondent sent the barge "T. N. No. 73" to receive a portion of the cargo (Finding 4, R. 266).

"T. N. No. 73," a single skin, steel tank barge, with four cargo tanks and two peak tanks (Finding 7, R. 267), had been built at some time during the period from 1916-1920 as an oil barge. The barge had, however, carried molasses "on numerous occasions," and had carried molasses for petitioner before this loss occurred (Finding 10, R. 267-8). The barge was brought alongside the "Athelsultan" between 8:30 and 9:00 P. M. on the evening of October 23, 1937, the discharging hose of the "Athelsultan" was coupled to the barge, and pumping began at 9:05 P. M. (Finding 11, R. 268).

The forward tanks of the barge were partially loaded first (Finding 12, R. 269), and later the after tanks were connected up for loading (Finding 15, R. 269). About 1:05 A. M. October 24th, while the after tanks were being loaded, the barge became submerged by the stern (Finding 15, R. 269), and remained with her stern submerged but with her bow suspended by her forward lines and ship's pumping hose until 6 A. M., when the lines and pumping hose gave way. The barge then sank (Finding 19, R. 270). Only a small part of the molasses was saved; and the value of the barge, after the salvage operations, was only \$800 (Finding 20, R. 271).

There was no unusual condition of wind or sea to account for the sinking of the barge; nor was there any

evidence of any kind offered by respondent which the District Court considered to be an adequate explanation of the loss (Findings 21, 23, 25, 26, 27, R. 271-273; Conclusions 1, 2, R. 280).

Respondent contended that the sinking was caused by the negligence of the mate in overloading the after tanks of the barge. The District Court found: "I do not find the evidence sufficient to establish this as a fact" (Finding 28, R. 273).

As to the surveys of the barge when she was examined in her battered condition, after having been raised, the Court found:

"All that could be said of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected" (Finding 25, R. 272).

The findings concerning the condition of the barge prior to the loading are contained in Finding 26 (R. 272, 273), from which it appears that during May, 1937, five months before the sinking, the barge had been on drydock and necessary repairs had been made, but since that time only visual examinations of the barge had been made. When the barge was inspected shortly before loading, the cargo tanks were covered with a skin of molasses (R. 273). There is uncontradicted testimony in the record that there were "around 1500 short rivets" in the barge (R. 193), and that whether such rivets were leaky could only be determined by testing them with a hammer and that the barge was not clean enough for that (R. 194).

In Conclusion 1 (R. 280) the District Court said:

"When a boat sinks in smooth water and without external contact of any kind, there is a presumption

of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, I find that this loss resulted from unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 52 F. (2d) 494" (R. 280).

The District Court held, however, that the petitioner had failed to comply with the obligation contained in the contract of affreightment to supply insurance, and for that reason dismissed your petitioner's claim. Thereupon your petitioner appealed to the Circuit Court of Appeals for the Second Circuit.

### **Decision of the Circuit Court of Appeals**

While the Circuit Court of Appeals for the Second Circuit affirmed the final decree of the District Court exonerating the vessel owner from liability, it reached that result on a different legal basis from that of the District Court. It did not pass on the question of the validity and effect of the insurance clause which was the sole basis upon which the District Court found in favor of the carrier (R. 297). In effect, it reversed on a point of law the ruling of the District Court as to the legal liability of the vessel owner for cargo damage resulting from the unexplained sinking of the barge in smooth water without any external contact with any other vessel or object (R. 296-297). In so doing, it did not disturb the findings of fact made by the District Court, but disposed of the case on the basis of those findings being valid, saying:

"Therefore, since we cannot say that the finding was 'clearly erroneous' in holding that no conclusion was possible upon the issue; we are to dispose of the case with that as datum" (R. 293).

After stating that the cause of action was based upon a breach of the warranty of seaworthiness and that the "promisee has the burden of proving the breach (of the warranty of seaworthiness), by which we mean that, if the Judge is unable to make up his mind upon the issue, the promisee fails" (R. 295), it proceeded to say:

"In all cases, therefore, where the shipper must show the ship unseaworthy, that duty remains upon him throughout. It is enough on his case in chief if he shows that she developed an unaccounted for defect early in the voyage, because it is reasonable to infer from that that the defect must have existed before, but he must lay any doubts which remain when the whole evidence is in" (R. 296).

The Court then concluded as follows:

"We do not understand that the judge in declaring that he could not decide whether the barge was seaworthy, did not consider her unexplained sinking as part of the evidence before him; but that, on the contrary, having weighed everything, including her sinking when she did, he was left in doubt. He then took recourse to the presumption which he supposed to persist as a determining legal factor. So far as we can see, that was the exact equivalent of putting the burden upon the Barge Company to prove that the barge was seaworthy" (R. 297).

Since the Circuit Court of Appeals rested its decision upon the ground that your petitioner could not recover because it had not proved the barge unseaworthy in precise and specific respects, it did not decide the question as to whether petitioner had breached its contract with respondent when it failed to take out insurance covering the vessel owner's liability under the warranty of seaworthiness (R. 297).

## Petition for Certiorari

In the petition for a writ of certiorari petitioner presented the following questions:

1. (a) Whether the presumption of unseaworthiness, which arises in favor of a cargo owner when a vessel sinks in calm weather, continues after the vessel owner has failed to rebut the presumption by reliable evidence? In other words, whether the presumption persists only when no evidence whatever is offered in rebuttal and does not persist when the evidence offered is found to be not "reliable" and of such a nature as to leave the Court to "sheer guess work in attempting to draw any conclusions" (Finding 40, R. 277-8)?

(b) Whether the presumption of unseaworthiness continues when the Court finds that the evidence offered to displace the presumption is not "sufficient" to establish negligence not associated with unseaworthiness (Finding 28, R. 273), which was the only cause for the sinking not connected with unseaworthiness suggested by the vessel owner, particularly where such evidence failed "to disclose the cause of the sinking" (Finding 25, R. 272)?

(c) Whether after such evidence is offered the cargo owner must by affirmative evidence establish unseaworthiness by precise and specific evidence of the nature thereof?

2. Whether in such case the burden of proof is not on the vessel owner to establish that his vessel was in fact seaworthy?

3. Whether the long line of decisions of this Court, and of the Circuit Courts of Appeal for the Third, Fourth, Fifth and Ninth Circuits holding that the burden is on the vessel owner in such a case to

establish seaworthiness of his vessel are now to be disregarded?

4. Whether owners of goods are to be required to insure against a vessel owner's negligence in failing to provide a seaworthy ship.

## ARGUMENT

### I.

**In every contract for the carriage of goods by water there is a warranty of seaworthiness. The warranty is sometimes expressed and when not expressed, it is implied. It is absolute and any modification of the absolute nature of the warranty must be clearly expressed and confined within strict limits.**

The warranty here was expressed and was in the following words:

"The barge owners undertake and agree that the barges owned and/or chartered are tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and will maintain the barges in such condition during the life of this contract" (Finding 42, R. 278).

This warranty of seaworthiness relates to seaworthiness throughout the life of the contract and is in the usual form for such warranties. *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, 150; *Federal Forwarding Co. v. Lanasa* (C. C. A. 4), 32 F. (2d) 154, 155; *McIver & Co., Ltd. v. Tate Steamers, Ltd.*, (1903) 1 K. B. 362.

The warranty is absolute—*The Edwin I. Morrison*, 153 U. S. 199, where at pages 210, 211, this Court said:

“As said, on circuit, by Mr. Justice GRAY, in *The Caledonia*, 43 Fed. Rep. 681, 685: ‘In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence.’ In *The Glenfruin*, 10 P. D. 103, 108, the same rule is thus expressed by BUTT, J.: ‘I have always understood the result of the cases from *Lyon v. Mells*, 5 East, 429, to *Kopitoff v. Wilson*, 1 Q. B. D. 377, to be that under his implied warranty of seaworthiness, the ship owner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind, it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel v. State Line Steamship Co.*, 3 App. Cas. 72.’ ”

*The Caledonia*, 43 Fed. 681, later came to this Court and was affirmed as *The Caledonia*, 157 U. S. 124.

See also:

*The Irrawaddy*, 171 U. S. 187, 190;

*The Southwark*, 191 U. S. 1, 6;

*Oxford Paper Co. v. The Nidarholm*, 282 U. S. 681, 684;

*Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 426;

*May v. Hamburg*, 290 U. S. 333, 345;

*Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82, 88.

Clauses modifying a warranty of seaworthiness must be confined in strict limits. They cannot "be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage." *The Carib Prince*, 170 U. S. 655, 659.

That petitioner's cause of action against respondent was for the breach of the undertaking to supply a seaworthy ship was recognized by both lower courts (R. 258, 296). Such a cause of action is independent of the provision of the contract to carry the cargo safely.

This Court has held that if a vessel be unseaworthy at the time of the commencement of the voyage, the shipowner is liable for damages caused by the breach, and this is a liability which arises independently of the provisions of statutes relating to carriers, viz., The Harter Act. *The Southwark*, 191 U. S. 1.

In *Scrutton on Charter Parties*, 14th Ed. at page 100, the learned author in the course of his discussion of the warranty of seaworthiness said: "This implied undertaking arises not from the shipowner's position as a common carrier, but from his acting as a shipowner."

In *Kopitoff v. Wilson*, 1 Q. B. D. 377, at page 382, the Court dealt with the question at some length. It was argued that the warranty of seaworthiness did not impose an obligation which was more than a subordinate part of the more extensive liability attaching to carriers, and that it was by virtue of the obligation of the carrier to carry safely and securely that any liability under a contract of carriage arose. The Court rejected that argument and pointed out that the principle underlying the warranty of seaworthi-

ness always received a wider application, and that "the existence of the warranty in question on the part of a ship-owner is asserted with reference to his character as such, and not as existing only in those cases in which he is also acting as a public carrier."

It follows that if the barge was unseaworthy, *i. e.*, if the vessel owner breached its express warranty of seaworthiness, respondent is liable for the resulting loss to cargo, unless the insurance provision of the contract excuses the respondent from liability.

## II.

**The barge was unseaworthy. A presumption of unseaworthiness arose in favor of the cargo owner when the barge sank in smooth water without any external contact.**

It is well settled by a long line of decisions, that when a vessel sinks during loading, or shortly after sailing, in smooth water, without any visible or adequate cause to produce such an effect, the presumption is that she was unseaworthy. See *Work v. Leathers*, 97 U. S. 379, 380, where this Court said:

"If a defect without any apparent cause be developed, it is to be presumed it existed when the service began. *Talcot v. Commercial Insurance Co.*, 2 Johns. (N. Y.) 124."

*Talcot v. Commercial Insurance Co.*, 2 Johns. (N. Y.) 124, cited in *Work v. Leathers*, rested upon the following passage in *Marshall on Insurance*, London, 1802, page 373:

"But if a ship, within a day or two after her departure, become leaky and founder at sea, or be obliged to put back, without any visible or adequate cause to produce such an effect, the natural pre-

sumption is, that she was not seaworthy when she sailed; and it will then be incumbent on the insured to shew the state she was in at that time."

In *The Jungshoved*, 290 Fed. 733, certiorari denied 263 U. S. 707, relied upon by the District Court, Judge Hough, speaking for the Circuit Court of Appeals for the Second Circuit, used the following picturesque language:

"It follows that the fact stands uncontradicted that the Crown was tendered as suitable to carry the load for which her size fitted her, and under less than that load, in smooth water and calm weather, she sank; in the picturesque phrase of the water front, 'she just faded away' without explanation, then or since. This raises a presumption of unseaworthiness (*Dupont v. Vance*, 19 How. 162,\* 15 L. Ed. 584; *The Kathryn B. Guinan*, 176 Fed. 301, 99 C. C. A. 639), which, though rebuttable, has not been met. Therefore the lighter and her owner are liable and may be held for damages if properly sued" (290 Fed. 734, 735).

In *Globe & Rutgers Fire Insurance Co. v. United States*, 105 F. (2d) 160, 164, certiorari denied 308 U. S. 611, the same Court announced the same doctrine. Judge PATTERSON in *The Emergency*, 9 F. Supp. 484, applied the same law.

To the same effect see *The Southwark*, 191 U. S. 1, 13, 14:

"The testimony discloses an inspection upon the part of the carrier shortly before the sailing of the vessel, in which by superficial observation no defect in the refrigerating apparatus was discovered,

\* The circumstance that the citation of *Dupont v. Vance*, 19 How. 162, by Judge Hough in *The Jungshoved*, is a mistake and should have been *Work v. Leathers*, 97 U. S. 379, is unimportant. Judge LEARNED HAND says in the present case (R. 295) that the mistake arose because of misplaced quotation marks in *Oregon Round Lumber Co. v. Portland, &c., S. S. Co.*, 162 Fed. 912, 921. This is quite true, but we submit that the mistake is unimportant. It merely requires us to look to *Work v. Leathers* for authority rather than to *Dupont v. Vance*.

but the testimony also shows that but a short time after the sailing of the ship, within one to three hours, the apparatus broke down, and was repaired, and then broke down again, and during the voyage to Liverpool did not reduce the temperature of the storage room sufficiently to preserve the meat, which was found to be in a very bad condition upon the opening of the refrigerating box at Liverpool. This sudden breakdown when the vessel was scarcely out of port would raise the presumption of unseaworthiness at the time of the sailing, making it incumbent upon the vessel owner to prove seaworthiness, and this independently of the provisions of the Harter Act. *Work v. Leathers*, 97 U. S. 379."

The rule is supported by an unbroken line of decisions of this Court and of the lower federal courts, as well as of the state courts.

*The Edwin I. Morrison*, 153 U. S. 199, 212;

*Pendleton v. Benner Line*, 246 U. S. 353;

*Cort v. Insurance Co.*, 2 Wash. C. C. 375, F. C. No. 3257;

*The Planter*, 2 Woods 490, F. C. 11207a;

*Barnewall v. Church*, 1 Caines 217, 234;

*Paddock v. Franklin Ins. Co.*, 11 Pick. 226, 237;

*Walsh v. Washington Ins. Co.*, 32 N. Y. 427, 436-7;

*The Arctic Bird* (D. C. Cal.), 109 F. 167, 170;

*Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co.* (D. C. Oregon), 162 F. 912, 920-21;

*Forbes, et al. v. Merchants Exp. & Transp. Co.* (D. C., E. D. N. Y.), 111 F. 796, 800, affirmed (C. C. A. 2d), 120 F. 1019;

*S. C. Loveland Co. v. Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655;

*The John Twohy* (C. C. A. 3), 279 Fed. 343, 344 (reversed on other grounds, 255 U. S. 77);

*Bank Line, Ltd. v. Porter* (C. C. A. 4), 25 F. (2d) 843, 845, certiorari denied 278 U. S. 623;

- Gardner et al. v. Dantzler Lumber & Export Co., Inc.* (C. C. A. 5), 98 F. (2d) 478, 479;
- Pacific Coast S. S. Co. v. Bancroft-Whitney Co., et al.* (C. C. A. 9), 94 Fed. 180, reversed on other grounds 180 U. S. 49;
- U. S. Metals Refining Co. v. Jacobus* (C. C. A. 2), 205 Fed. 896;
- The Transit*, 250 Fed. 71, 72;
- The Fort Gaines*, 24 F. (2d) 849, 851;
- The Harper No. 145* (C. C. A. 2), 42 F. (2d) 161, certiorari denied 282 U. S. 875;
- The Calvert*, 51 F. (2d) 494 (C. C. A. 4);
- The Cullen No. 32*, 62 F. (2d) 68, affirmed 292 U. S. 82;
- Societa Anonima Cantiero Olivo v. Federal Ins. Co.* (C. C. A. 2), 62 F. (2d) 769, certiorari denied 289 U. S. 759;
- Flat-Top Fuel Co. v. Martin* (C. C. A. 2), 85 F. (2d) 39.

The Circuit Court of Appeals recognized that the cases support the presumption. It cited some sixteen cases to that effect in its opinion (R. 295). It said, however, these cases need not be taken "as necessarily intended to mean that it is the owner which must persuade the court of the ship's seaworthiness" (R. 295). In referring to certain cases, particularly to *Harper No. 145*,\* 42 F. (2d) 161, certiorari denied 282 U. S. 875, the Court remarked that it is notorious that Judges often speak of the burden of proof when they mean no more than "that, if the trial had

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\* Erroneously referred to by the Circuit Court of Appeals as *The Harper No. 195*. In that case the Circuit Court of Appeals for the Second Circuit had said: "The owner has the burden of proving that his barge was seaworthy when the cargo of chalk was loaded. The leaking and capsizing on August 28 raised a presumption of unseaworthiness" (42 F. (2d) 163).

ended with the evidence that is said to 'shift' the 'burden,' that party would lose to whose shoulders it had been shifted" (R. 296).

### III.

**The presumption of unseaworthiness established by proof that the barge sank in smooth water without any external contact continued. It has not been rebutted by any substantial proof. Substantial proof means reliable testimony, well founded testimony, valuable testimony. The District Court held that the testimony offered in rebuttal of the presumption here was unreliable, not well founded, and valueless.**

In the case at bar the Circuit Court of Appeals erroneously ruled that the presumption of unseaworthiness, or rather the inference that the loss was occasioned by unseaworthiness, arising from the uncontradicted evidence that the barge had sunk in smooth water without any external contact, did not continue after the vessel owner offered testimony as to other possible causes of sinking even though such testimony on examination was found to be unreliable and not well founded and inadequate to establish any cause for the barge's sinking other than unseaworthiness. This results in a complete nullification of the long established presumption of unseaworthiness above referred to in every instance where the vessel owner offers any testimony whatsoever, no matter how flimsy and valueless such testimony may be. Such a ruling was clearly contrary to all previous authority.

The situation presented here is almost exactly like that in *Pendleton v. Benner Line*, 246 U. S. 353, where this

Court approved the conclusions of both courts below when they held that the unseaworthiness had been proved.

The District Court in the *Pendleton* case held:

"I have no doubt that her owners believed her to be seaworthy. But facts in such a case speak louder than words, and the facts that she sprang so bad a leak on the first night of heavy weather that occurred upon her voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage." (*Benner Line v. Pendleton*, 210 F. 67, at p. 70.)

There was testimony in that case of striking a floating object, but the Court rejected that testimony, just as the District Court here rejected the testimony concerning negligent loading.

The Circuit Court of Appeals in the *Pendleton* case affirmed the finding of unseaworthiness made by the District Court. After reviewing testimony as to the vessel's seaworthiness, and commenting upon testimony where witnesses had said "that she was 'in first class condition,' 'one of the finest vessels' the witness had ever seen, and 'fit to go around Cape Horn' " (217 F. 501) and after concurring with the District Court as to the unreliability of the testimony in support of the shipowner's explanation of the sinking, the Court said:

"The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage." (*Benner Line v. Pendleton*, 217 F. 497, 503.)

There, as here, the ground of the suit was unseaworthiness. In commenting upon the conclusions below, this Court, speaking through HOLMES, J., said:

“The ground of the suit is that the vessel was unseaworthy at the beginning of the voyage and that by reason thereof she sank and her entire cargo was lost. Both courts below held that the unseaworthiness was proved, and on the evidence that question may be laid on one side.” (*Pendleton v. Benner Line*, 246 U. S. 353, 354.)

In the present case, as in the *Pendleton* case, the ship sank without any apparent cause; testimony was offered in that case to prove that the loss was due to something other than unseaworthiness, but this testimony was not convincing. Therefore, the situation presented in the case at bar is identical with the situation presented in the *Pendleton* case, and the result should be the same.

The vice in the reasoning of the Circuit Court of Appeals lies in its assumption that the District Court had doubt as to the correctness of its finding that the barge was unseaworthy.\* We submit that the findings and conclusions of the District Court give no ground for this assumption.

In its Conclusion 1 the District Court made the unequivocal finding “that this loss resulted from unseaworthiness” (Conclusion 1, R. 280). In Conclusion 2 it stated that the best that could be said on behalf of respondent was “that the cause of the accident has been left in doubt.” These statements are not irreconcilable. The second statement does not detract from the first, and in

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\* Judge LEARNED HAND wrote: “The finding that the ‘cause of the accident has been left in doubt,’ means, we take it, that the evidence as to whether or not the barge sank because of unseaworthiness, was so evenly matched that the judge could come to no conclusion upon the issue” (R. 293).

making it the Court did not indicate that it had any doubt concerning the cause of the loss. It knew it was unseaworthiness because on the proof no other inference was possible. It is true that no one could say whether the unseaworthiness related to the bottom, or to the sides, or to the deck of the barge; nor was there proof as to what aperture water got through into the tanks inside the barge. But lack of such proof does not affect your petitioner's case, for your petitioner had already proved its case when it showed a sinking without any external cause.

The words quoted by the Circuit Court of Appeals (R. 293) from the Conclusion 2 of the District Court have been lifted from their context (R. 280). When read in their context, they do not have the meaning stressed by the Circuit Court of Appeals. Moreover, these words are discussed by the Circuit Court of Appeals without regard to the specific findings of fact which the District Court had made before reaching Conclusion 1 (R. 270, 273, 275, 278, 280).

The following facts were established to the satisfaction of the District Court:

1. The barge sank in smooth water (Conclusion 1, R. 280).
2. The sinking occurred "without any external contact of any kind" (Conclusion 1, R. 280).
3. The sinking occurred during loading (Finding 19, R. 270-271).
4. The respondent alleged that the sinking was caused by negligence of the mate in overloading the after tanks of the barge. The Court found: "I do not find the evidence sufficient to establish this as a fact" (Finding 28, R. 273).

5. Respondent's employee, the mate, and respondent's experts gave testimony which led the Court to say that their testimony was a matter of speculation only (Finding 34, R. 275). The mate's contradictory statements as to freeboard and as to time of change from filling the forward tanks to the after tanks, made a most unfavorable impression on the District Court. The Court found that "neither statement of the mate is reliable and we are left to sheer guess work in attempting to draw any conclusions from his testimony" (Finding 40, R. 278).

6. The Court rejected the testimony of respondent's experts as to negligent loading because their estimates and conclusions were not well-founded (Finding 35, R. 275), and in Finding 41 the District Court referred to their computations as valueless.

These findings are definite. Their meaning is not doubtful. We respectfully submit that they do not justify the statement of the Circuit Court of Appeals that the District Court was in doubt as to the facts. Conclusion 1 (R. 280) was not without foundation. It had the very solid foundation of the facts which we have just enumerated. In that conclusion the District Court said:

"1. When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. As I have found as a fact that there is not sufficient evidence to rebut this presumption, I find that this loss resulted from unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshoved*, 290 F. 733; *The Calvert*, 51 F. (2d) 494."

After arriving at that conclusion, the District Court dealt with respondent's contentions, and in disposing of them said:

"2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner (respondent here) in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner (respondent) of the right to limit liability to the value of the barge and her freight then pending" (Conclusion 2, R. 280).

In this sentence the District Court is merely pointing out that even taking the most favorable view of the respondent's evidence, it finds it insufficient to overcome the presumption of unseaworthiness. It is significant that this sentence, as it was originally used in the District Court's opinion (R. 258), follows immediately after the District Court's discussion of the evidence which it subsequently reduced to findings enumerated above (pp. 19-20). A reference to that discussion will dispel any doubt as to what the District Court meant (R. 253-258). The Court's finding of unseaworthiness was based upon facts which compelled that conclusion, viz., the sinking during loading in smooth water, when there was no contact between the barge and any vessel or object of any kind to account for the sinking. Respondent was unable to offer any reliable or substantial evidence to explain the sinking. The conclusion of the District Court as to unseaworthiness was in full accord with that of this Court in *Del Vecchio v. Bowers*, 296 U. S. 280, and *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 170, which the Circuit Court of Appeals cited against the District Court. In those cases this Court held that the effect of the presumption persisted until substantial proof to the contrary is introduced. Here no substantial proof was offered to the contrary. In *Pendleton v. Benner Line*, *supra*, the un-

reliable evidence of a mate was rejected. This court did not suggest, as the Circuit Court of Appeals ruled here, that the mere offering by respondent of such testimony prevented the presumption from continuing and controlling.

An examination of the English cases, relied upon by the Circuit Court of Appeals, shows that they do not support its decision. The House of Lords in *Lindsay v. Klein*, 1911 A. C. 194, does not support the propositions argued in the opinion of the Circuit Court of Appeals. In that case Lord LOREBURN said:

“If this ship was seaworthy, what occurred to her almost immediately after she left port is quite unaccountable, and it is the shipowner’s business to account for it if he can in some way which shall displace the natural inference” (1911 A. C. 197).

And Lord SHAW of Dunfermline said:

“My lords, in the judgments stress is repeatedly laid upon the fact that the onus of proving unseaworthiness is upon those who allege it. This is, of course, a sound doctrine; and it is none the less sound although the vessel break down or sink shortly after putting to sea. That is the principle of law. But the enunciation of that proposition does not impair or alter certain presumptions of fact, such presumptions, for instance, as those which arise from the age, the low classing, or non-classing, the non-survey of ship or machinery, the refusal to insure, the laying up, the admitted defects, and generally the poor and worsening record of the vessel, together with finally the breakdown, say, of the machinery, immediately, or almost immediately, on the ship putting to sea. It would be a very curious, and, in my opinion, an unreasonable and dangerous, thing if circumstances like these did not raise presumptions to which, especially taken cumulatively, effect were not to be given in Courts of law.

The last circumstance mentioned is a very familiar example. In the language of Lord REDESDALE in *Watson v. Clark* (1 Dow. 336, 348), decided nearly a century ago, 'He had always understood it to be a clear and distinct rule of law that if a vessel in a short time after leaving the port where the voyage commenced was obliged to return, the presumption was that she had not been seaworthy when the voyage began, and that the *onus probandi* was in such cases thrown upon the assured.'

Lord ELDOX, in the same case, was even more emphatic: 'When the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was that it was from causes existing before her setting sail on her intended voyage, and that the ship was then "not seaworthy," and the *onus probandi* in such a case rested with the assured to shew that the inability arose from causes subsequent to the commencement of the voyage' " (1911 A. C. 203, 204).

and again he said:

"In short, the whole evidence in the case must be weighed, and when those alleging unseaworthiness prove a mass of facts such as I have mentioned, and such as appear in this case bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may of course be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character. My Lords, I venture humbly to think that had due effect been given to the above mentioned principles, certain of the difficulties which appeared to the learned judges below would have been found less formidable, and that the review of the evidence would have resulted in a verdict for the defenders." *Lindsay v. Klein*, 1911 A. C. 205.

A careful reading of this decision, we submit, does not warrant the statement in the opinion of the Circuit Court of Appeals (R. 294) that Lord SHAW of Dunfermline overruled *Watson v. Clark* (1 Dow. 336, 348). On the contrary, Lord SHAW of Dunfermline expressly held that there is a presumption of unseaworthiness when there is a breakdown of a vessel shortly after leaving port and he condemned the lower Court for not giving effect to it under the circumstances of that case.

The facts in *Pickup v. Thames & Mersey Marine Insurance Co., Ltd.*, 3 Q. B. D. 594 (1878), much relied upon by the Circuit Court of Appeals, were: The ship "Diadem," after loading a cargo of rice at Rangoon, sailed for England. Five days after leaving Rangoon the vessel encountered severe squalls and a heavy sea, and labored heavily and made much water. These conditions persisted for six days. The master and crew, becoming alarmed as to the safety of the ship, determined to return to Rangoon. The question before the jury was whether the leaking of the vessel was due to the rough weather which the vessel had encountered after leaving Rangoon or to unseaworthiness. At the conclusion of the summing up the jury retired to consider their verdict, and after a protracted absence returned to the Court, asking the Judge to give them more precise directions. The Court then instructed the jury that, if the inability of the ship to proceed on the voyage became evident in a short time after her sailing, the presumption of law under the facts of the case was that the inability arose from causes existing before she set sail, and that in such event the burden of proof becomes shifted and that it then rested upon the assured to show that the inability arose from causes occurring subsequent to the commencing of the voyage. The Court went further and directed the jury as a matter of law that the time which had elapsed

between the departure of the ship from Rangoon on the 4th day of June and her putting back on the 15th, was a sufficiently short time to shift the onus of proof, and to make it incumbent on the assured to satisfy the jury the unseaworthiness of the vessel arose from causes occurring subsequently to her setting sail on the voyage. When the case came before the full Queen's Bench, a new trial was ordered, on the ground that the facts did not warrant the direction. The Court, however, recognized that "if a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached" (at p. 597). It pointed out that the ship had not been at sea for a short time. She had been at sea eleven days before she put back. It pointed out further that even assuming that the shortness of time intervening between the departure and her inability to keep the sea was sufficient to raise an inference of unseaworthiness, sight could not be lost of the fact that during that period the vessel encountered severe weather. The circumstance that the vessel leaked after she put to sea, was not one which compelled an irresistible inference, because during the period after leaving port the vessel had encountered severe weather, which might have been sufficient to account for the sinking. This judgment of the Queen's Bench Division was affirmed by the Court of Appeal. BRETT, *J.* was careful not to depart from *Watson v. Clark*, 1 Dow. 336, 348, and pointed out that in the absence of any proof of a violent storm or extraordinary peril of the sea, the leaking of a vessel shortly after sailing did raise "the fair and natural presumption" "that it arose from causes existing before the setting out on her voyage, and, consequently, that she

was not seaworthy when she sailed" (at p. 600). The Court pointed out that because there was proof of a violent storm and extraordinary perils of the sea, the presumption did not arise in that case.

The Circuit Court of Appeals also cited *Ajum Goolam Hossen & Co. v. Union Marine Insurance Company, Ltd.*, 1901 A. C. 362. In that case a suit was brought on four policies of insurance on cargo which had been shipped on board the S. S. "Taif," to be carried from Port Louis, Mauritius, to Bombay. The underwriters defended on the ground that the ship was unseaworthy when she sailed from Mauritius. The vessel capsized and sank in less than twenty-four hours after she left port, without having encountered any storm or other known cause sufficient to account for the catastrophe.

There was strong evidence to show that the ship was lost, not through unseaworthiness, but through the negligence of her crew in failing to take the necessary navigational precautions to protect her after the danger from incoming seas had become apparent to her crew. The Privy Council's conclusions were summed up in these words:

"Their Lordships are of opinion that the evidence tends more strongly to shew that the loss of the ship was attributable to mistakes made in her management after she sailed, rather than to her unseaworthiness when she sailed. The balance of the evidence is against rather than in favour of unseaworthiness at that time" (1901 A. C. 370).

Lord LINDLEY, who delivered the judgment, said that:

"If nothing more were known, *unseaworthiness at the time of sailing would be the natural inference to*

*draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a Court ought to act upon if unassisted by a jury. But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship are proved, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established, and the defense founded upon it must fail"* (1901 A. C. at p. 366). (Italics ours.)

In the case at bar the other facts were not proved (Finding 28, R. 273). The reason they were not proved is that the District Court found that the evidence offered in their support was unreliable, not well founded, and valueless.

Before closing the discussion under this heading, we call to this Court's attention the thorough discussion of the principles involved in *S. C. Loveland Co. v. Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655, where the legal situation was identical with that which existed here. There, as here, the vessel owner was not a common carrier. The cargo owner based its claim for recovery against the shipowner upon breach of the warranty of seaworthiness. The proof of unseaworthiness consisted of testimony "that the lighter filled and sank without any reason then apparent. She just sank" (33 F. (2d) 657). The Circuit Court of Appeals for the Third Circuit held that the presumption of unseaworthiness arising from such proof could not be met "by merely showing such a state of facts that the court is unable to discover how the disaster occurred" (33 F. (2d) 657), and that when such a situation is the result, even if

the vessel owner's proof is accepted as true, then the presumption persists and the facts upon which the presumption rests are a proper basis for finding the vessel unseaworthy. The Court said at 33 F. (2d) 657:

"The Loveland Company, thus confronted by the presumption and being driven to rebut it, set about the task of proving the lighter's seaworthiness. This became purely an issue of fact. \* \* \* Evidence of previous good condition has some probative value and therefore is admissible in rebutting the presumption of unseaworthiness, but clearly it is not enough alone. A party rebutting the presumption must show affirmatively that the damage was caused by a peril of the sea or other things excepted by the contract of affreightment and cannot absolve himself from blame by merely showing such a state of facts that the court is unable to discover how the disaster occurred, or that it might have occurred from something which, if only it were known, is a peril of the sea. *Work v. Leathers*, 97 U. S. 379, 24 L. Ed. 1012; *The Queen* (D. C.) 78 F. 155; *Saubern v. Wright & Cobb Lighterage Co.* (D. C.) 171 F. 449; *Tucker Stevedoring Co. v. Southwark Manufacturing Co.* (C. C. A.) 24 F. (2d) 410."

So also in the Fourth Circuit, it has been held in *Bank Line, Ltd. v. Porter* (C. C. A. 3), 25 F. (2d) 843, 845, certiorari denied 278 U. S. 623, that:

"If there is any doubt as to the seaworthiness of the vessel, that doubt 'must be resolved against the shipowner and in favor of the shipper.' *The Southwark*, 191 U. S. 1."

And in the Ninth Circuit in *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.* (C. C. A. 9), 94 F. 180, reversed on other grounds 180 U. S. 49, the Circuit Court of Appeals applied the same principles. The situation in that case was

similar to that presented here in that the attempted explanation of the respondent vessel owner failed to disclose any cause of the damage. The Court pointed out that this led to an inference that the facts had not been fully disclosed. The Court adopted the language of Judge HOFFMAN in *The Compta* (D. C. Cal.), 4 Sawy. 375, Fed. Cas. No. 3069.\*

Since the evidence which respondent offered in the case at bar to rebut the presumption was not sufficient for that purpose, it is submitted that the presumption persisted and the Circuit Court of Appeals should have accepted the conclusion of the District Court that the barge sank because she was unseaworthy (Conclusion 1, R. 280).

#### IV

**A shipowner can and must know at his own peril the condition of the vessel in which he proposes to carry the goods of other people; while the cargo owner is under no obligation to look after such matter. Hence the burden of proving that the vessel was in fact seaworthy rests upon the vessel owner and he must lay any doubts as to her fitness to perform the voyage which he had undertaken that she would perform safely.**

As we have shown above, the principle promulgated by the Circuit Court of Appeals in the case at bar results, in every instance where the vessel owner offers any testimony as to the cause of the loss, no matter how valueless and ill-founded such testimony may be, in a complete nullification of the presumption of unseaworthiness long recognized

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\* Cited with approval by this court, *The Folmina*, 212 U. S. 354, 363.

to arise from uncontradicted proof of a vessel's sinking in smooth water without apparent cause and without external contact with any object. Under the ruling made by the Circuit Court of Appeals herein, the cargo owner under such circumstances cannot rely on the inference of unseaworthiness arising from an unexplained sinking in smooth water, but must bear the burden of affirmatively proving specific items of unseaworthiness. In other words, it must offer precise evidence as to facts which are peculiarly, and often solely, within the vessel owner's own knowledge. It has often been recognized that the seaworthiness or unseaworthiness of a vessel is determined by facts of this class. For example, this Court long ago in *The Northern Belle*, 76 U. S. (9 Wall.) 526, in discussing (p. 529) "the duty or obligation which the law imposes upon the owners" of a vessel "as to seaworthiness or fitness to perform the voyage which her owners had undertaken that she should perform safely," pointed out at page 529:

"This duty is one which must obviously belong exclusively to the carrier. He can and must know, at his own peril, the condition of the barge in which he proposes to carry the goods of other people; while the owner of the cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it."

For a recent restatement of this principle, see *Schnell v. The Vallescura*, 293 U. S. 296, where Mr. Justice STONE wrote, at pages 303-304:

"In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity

from liability for act of God or the public enemy. See Carver, *Carriage by Sea* (7th ed.), Chap. I. The rule applies equally with respect to other exceptions for which the law permits him to stipulate. *Clark v. Barnwell*, 12 How. 272, 280; *Rich v. Lambert*, 12 How. 347, 357; *The Propeller Niagara v. Cordes*, 21 How. 7, 29; *The Maggie Hammond*, 9 Wall. 435, 459; *The Edwin I. Morrison*, 153 U. S. 199, 211; *The Folmina*, 212 U. S. 354, 361. The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. See *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 184; *Chicago & Eastern Illinois R. Co. v. Collins Produce Co.*, 249 U. S. 186, 192, 193; *Railroad Co. v. Lockwood*, 17 Wall. 357, 379, 380."

See also *The Wildcroft*, 201 U. S. 378, at pages 388-9.

In *The John Twohy* (C. C. A. 3), 279 F. 343, 344, modified by this Court because the Circuit Court of Appeals failed to give cargo a full recovery (255 U. S. 77), the Circuit Court of Appeals for the Third Circuit held:

"The libellant's first claim is for damages to the cargo. The schooner's liability arises from her warranty of seaworthiness, *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, under the obligation of shipowners to provide a seaworthy vessel unless by the terms of the charter-party they limit their obligation to the exercise of due care to

make her so. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. There was nothing in the charter-party limiting this obligation. *Therefore the burden of affirmatively proving her seaworthiness at the commencement of the voyage, as well as sustaining the defense that the damage to the cargo was due to perils of the sea within exceptions of the charter-party and bill-of-lading, rests upon the owners. International Navigation Co. v. Farr & Bailey Co.*, 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; *The Wildcroft*, *supra*. We find the owners have not sustained this burden." (Italics ours.)

In *Gardner v. Dantzler Lumber & Export Co., Inc.* (C. C. A. 5), 98 F. (2d) 478, 479, the Circuit Court of Appeals for the Fifth Circuit said:

"The burden was on respondents (vessel owners) to prove she was seaworthy."

See also *O. Y. Tonnage, A. B. v. Texas Co.* (C. C. A. 5), 296 F. 893, 896; *Companhia Naviera Mexicana, S. A. v. Spurl* (C. C. A. 5), 11 F. (2d) 777.

To the same effect is *The Indien* (C. C. A. 9), 71 Fed. (2d) 752, at page 755, where the Court said:

"At the outset, it must be borne in mind that the burden of proving the vessel's seaworthiness rests upon the shipowner. Any doubt must be resolved against him, 'with the presumption in favor of the appellee that it was the fault of the appellant.' *The Jeannie* (C. C. A. 9), 236 F. 463, 470." (Italics ours.)

We have found no case anywhere which supports the decision of the Circuit Court of Appeals for the Second Circuit in the instant case, to the effect that after it has

been shown that a vessel sinks in calm water, without known cause, the burden of proof is upon the cargo-owner to show unseaworthiness specifically.

Even the decisions in the Second Circuit do not support the decision below.

In *The Cullen No. 32*, 62 F. (2d) 68, affirmed *sub. nom. Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82, the Court said (p. 69):

“The owner has the burden of proving seaworthiness when the barge was delivered under her charter. *Taylor Bros. Lumber Co. v. Sunset Lighterage Co.*, 43 F. (2d) 700 (C. C. A. 2). We agree with the District Court that the Cullen Company has not carried that burden.”

In *The Phoenicia*\* (S. D. N. Y.), 90 F. 116, aff'd (C. C. A. 2), 99 F. 1005, Judge ADDISON BROWN said, at page 119:

“A further question arises upon whom the burden of proof in this respect rests; and in case of doubt, whether the ship or the merchant shall bear the loss. Upon the latter point, the law, as I understand it, is that the burden of proof rests upon the ship. In *The Edwin I. Morrison*, 153 U. S. 199, 211, 215, 14 Sup. Ct. 823, the decision turned essentially upon this principle. It was there repeatedly stated by Chief Justice FULLER in delivering the opinion of the Court, that it is for the owners to show affirmatively the safety and sufficiency of the ship's condition when she sails, by making all ordinary and reasonable tests.”

In *U. S. Metals Refining Co. v. Jacobus* (C. C. A. 2), 205 F. 896, the Circuit Court of Appeals affirmed by *per*

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\* Cited with approval by this Court, *The Folmina*, 212 U. S. 354, 363.

*curiam* opinion the decision of HOLT, D. J. in a case quite similar on its facts to the present case, in which the District Judge said (pp. 896, 897):

“Now, it is quite natural that the owners of this barge should have supposed that she was in good order, but the rule is fundamental that in contracts of affreightment the vessel must be seaworthy. It is not of any consequence whether the owner supposed it was seaworthy, or whether he had used his best efforts to ascertain whether she was seaworthy. It is an absolute requirement that she be seaworthy, based on the ground of public policy. The ordinary cargo owner does not know, and has no means of knowing, the condition of the vessel, and the owner is bound to have a vessel that is seaworthy at the beginning of the voyage.”

In the case of *Societa Anconima Cantiero Olivo v. Fed. Ins. Co.* (C. C. A. 2), 62 F. (2d) 769, cert. denied 289 U. S. 759, the action was by the shipowner against the cargo owner for contribution in general average. The affirmative defense of the cargo owner was that the ship was unseaworthy. The testimony on the issue of unseaworthiness was “confused” and “inconclusive.” The Court cited the decisions of this Court including the *Edwin I. Morrison, supra*, establishing the presumption of unseaworthiness because of a breakdown of machinery under circumstances under which such an accident should not have occurred. The Court reviewed the authorities with respect to the burden of proof on the issue of seaworthiness and said at page 771:

“Judge WARD decided flatly that the burden was on the ship in *The Lewis H. Goward* (D. C.) 34 F. (2d) 791, following the analogy of suits on contracts of affreightment. We reserved the points in

*Spang Chalfant & Co. v. Dimon S. S. Corp.*, 57 F. (2d) 965, but we cannot do so here. *It seems to us that the rule should be the same as in suits for cargo damage, and that the burden is upon the ship, and remains so throughout.* That she may start with a presumption in her favor, we need not deny. *Franklin Sugar Refining Co. v. Funch, Edye & Co.*, 73 F. 844 (C. C. A. 3). If so, the failure of so vital a part of her machinery in weather which it should withstand, if staunch, is all that the cargo is called upon to prove. *Thereafter she must prove her general fitness, and will fail upon the issue, if the evidence is in balance.*" (Italics ours.)

The practical reason for throwing upon a shipowner the burden of showing seaworthiness when a vessel sinks without known cause while loading, has also been recognized by the English Courts. Thus in *Cohn v. Davidson*, 2 Q. B. D. 455, at page 462, it is said:

"The ship is, during her stay in port, and whilst loading, and when she sets sail on her voyage, in the custody and possession and under the control of the master and crew, and it is most reasonable and convenient to impose upon those, who have the best means of knowing, the duty of ascertaining her condition at that critical time when she is about to meet the perils, which it is the object of all parties that she should be prepared to meet."

## V.

After it has been shown that a vessel leaks from some unknown cause while loading, or shortly after the voyage begins, a *prima facie* case of unseaworthiness is made out. If the shipowner intends to rebut such a *prima facie* case by proof as to the actual condition at the time of sailing, he will be held to strict proof to establish actual seaworthiness. He will not be permitted to substitute visual examination for known tests, and any doubts as to unseaworthiness should be resolved against the shipowner.

In *The Edwin I. Morrison*, 153 U. S. 199, a suit on a warranty of seaworthiness contained in a charter party, cargo had been damaged by seawater which had found its way into the vessel through a sounding pipe, which led to the weather deck. The pipe was fitted with a cap and plate as a cover. This cap and plate became dislodged during a storm, and in consequence, seawater which came on deck entered the vessel and damaged cargo. Before the ship left port both the cap and plate had been given such examination as a reasonably prudent master or owner might be expected to give them. Although tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any), this was not done (Findings XI and XII, 153 U. S. at p. 213). The cap and plate were examined after they gave way. At that time the wood, to which the plate had been fastened, looked white and sound, the screw holes were not smooth, not black nor rusty, nor did the wood look rotten. The timber into which the plug was driven and on which the lead was nailed, was found solid. No marks of violence other than the splintering of the wood about the screw-holes were visible. The

weather was no more than what was to be expected upon the voyage. On these facts this Court held that the inference was that the cap and plate were carried away because of unseaworthiness. The Court was of opinion that respondents had failed in their case because they had failed to establish seaworthiness. It said (p. 212):

“The burden was upon them [the shipowner] to show seaworthiness, and if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement.

We are unwilling, by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate, to relax the important and salutary rule in respect of seaworthiness. *The Reeside*, 2 Sumner, 567, 574; *Douglas v. Scougall*, 4 Dow. H. L. 269.” (*The Edwin I. Morrison*, 153 U. S. 199, 215.)

“In any aspect, the real point in controversy is, *did the respondents so far sustain the burden of proof which was upon them as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? If the determination of this question is left in doubt, that doubt must be resolved against them*” (*The Edwin I. Morrison*, 153 U. S. 199, 212). (Italics ours.)

In *The Southwark*, 191 U. S. 1, 15, 16, this Court repeated the statement it had made in the *Morrison* case. It said (p. 15):

“The burden was upon the owner to show by making proper and reasonable tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and *if by the failure to adopt such tests and to furnish such proofs the question of the ship's efficiency is left in doubt, that doubt must be resolved against the ship owner and in favor of the shipper.*” (Italics ours.)

The foregoing general rule has often been applied by the lower Federal Courts. For example, in *Nord-Deutscher Lloyd v. Ins. Co. of North America*, 110 Fed. 420, the Circuit Court of Appeals for the Fourth Circuit said, at page 425:

“The ship must be really fit to undergo the perils of the sea and other incidental risks to which she may be exposed. The obligation of due diligence to make the ship seaworthy is in all respects the same as before the Harter act, which does not establish any new rule of diligence. The shipowner cannot now, any more than before, rely upon external appearances in place of known tests, nor can the mere selection of competent persons to inspect satisfy the requirement of due diligence.”

See also to like effect:

*The R. P. Fitzgerald*, 212 Fed. 678, 686-7 (C. C. A. 6th) certiorari denied 234 U. S. 757;

*Compagnie Maritime v. Meyer*, 248 Fed. 881, 883-5 (C. C. A. 9th);

*The Charlton Hall*, 285 Fed. 640, 642 (S. D. N. Y.);

*The Leerdam*, 8 F. (2d) 295, 296, affd. 17 F. (2d) 586 (C. C. A. 5th);

*Warner Sugar Ref. Co. v. Munson S. S. Co.*, 23 F. (2d) 194, 197, affd. 32 F. (2d) 1021 (C. C. A. 2nd);

*The Phoenicia*, 90 F. 116; affirmed (C. C. A. 2)  
99 F. 1005.

In the case at bar, counsel for the shipowner contended that evidence showing what was usually done to ascertain seaworthiness is sufficient. This Court in *The Edwin I. Morrison*, 153 U. S. 199, rejected that argument. It held that it was unwilling to relax the rule which required that the shipowner demonstrate the fact of seaworthiness. So also here the rule should not be relaxed, and if respondent's proofs leave the question of the barge's seaworthiness in doubt, that doubt must be resolved against the respondent. *The Southwark*, 191 U. S. 1, 15, 16. *The Wildcroft*, 201 U. S. 378, 389.

It may be mentioned that the District Court, in the case at bar, found that the inside of the cargo tanks of the barge before loading were covered with a skin of molasses (Finding 26, R. 273). There was evidence that because of this coating of molasses, some 1500 short rivets could not be properly tested (R. 193-194). It is not even contended that these rivets were ever tested with a hammer as they should have been (R. 194). The failure of respondent to use known tests to ascertain the seaworthiness of the barge, destroys the respondent's case.

## VI.

**Owners of goods carried by water when they agree to insure such goods for the account of the carrier and to relieve the carrier from loss in respect of which insurance has been or could have been effected, do not agree to insure the carrier against the carrier's personal obligation to supply a seaworthy ship, nor do they agree to relieve the carrier from liability for losses caused by unseaworthiness.**

In addition to the warranty of seaworthiness quoted (*ante*, p. 9) and already discussed in this brief (*ante*, pp. 9-12), the contract of carriage contained the following provision:

“It is agreed that the Dunbar Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co., Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co., Inc. and/or the owners of such barges; and that neither the New York Tank Barge Co., Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected” (Finding 43, R. 278).

It is to be noted that this is a double-barreled clause. It is more than a mere agreement on the part of the shipper to insure the cargo for the account of the vessel owner. It goes further and purports to exempt the vessel owner from liability “for any loss in respect of which insurance has been or could have been effected.”

The District Court held that, although the barge “T. N. No. 73” was unseaworthy (Conclusion 1, R. 280)

and the warranty of seaworthiness was personal, *Pendleton v. Benner Line*, 246 U. S. 353; *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, and for that reason the respondent could not limit its liability for such breach (Conclusions 2 and 3, R. 280, 281), the petitioner could not recover from the respondent. It held that petitioner had not satisfied the provision of the contract of affreightment which we have just quoted, because the petitioner did not insure the cargo for the account of respondent (Finding 47, R. 280; Conclusions 6-15, R. 281-285). The effect of such ruling was to exempt the respondent vessel owner from liability for a loss caused by the breach of its express warranty of seaworthiness.

Petitioner appealed from this decision of the District Court to the Circuit Court of Appeals. That Court, however, concluded that since petitioner had not proved its case on the question of unseaworthiness, it was "not necessary to pass upon that question" (R. 297).

This question is presented to this Court in the Petition for a Writ of Certiorari as No. 4 of The Questions Presented in the Petition (Petition, p. 10). It comes here, for the reasons stated, without the benefit of the views of the Circuit Court of Appeals.

The warranty of seaworthiness is contained in a policy of marine insurance, even a policy on goods, as well as in a contract of affreightment.

We extract the following from *The Caledonia*, 157 U. S. 124, 132, where this Court quoted the following from *Kopitoff v. Wilson*, 1 Q. B. D. 377, 379, 381:

"It is well and firmly established that in every marine policy the assured comes under an implied

warranty of seaworthiness to his assurer, and if we were to hold that he has not the benefit of a similar implication in a contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss, which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is, that the merchant, by his contract with the shipowner, having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by his contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship."

This Court then said (157 U. S. at pp. 132-133):

"This was the view expressed by Mr. Justice BROWN, then District Judge, in *The Eugene Vesta*, 28 Fed. Rep. 762, 763, in which he said: 'There can be no doubt that there is an implied warranty on the part of the carrier that his vessel shall be seaworthy, not only when she begins to take cargo on board, but when she breaks ground for the voyage. *The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point up to which the warranty of seaworthiness extends.*' And the case of *Cohn v. Davidson*, 2 Q. B. D. 455, 461, was cited, where it appeared that the ship was not in fact seaworthy at the time she set sail, but that as she was found to be seaworthy at the time she commenced to take cargo, she must have received the damage in the course of loading; and FIELD, J., observed that 'no degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of

any avail to the assured, unless that seaworthiness existed at the time of sailing from the port of loading. As, therefore, the merchant in a case like the present would not be entitled to recover against his underwriter by reason of the breach of warranty in sailing in an unseaworthy ship, it would follow that, if the warranty to be implied on the part of the ship-owner is to be exhausted by his having the ship seaworthy at an anterior period, the merchant would lose that complete indemnity, by means of the two contracts taken together, which it is the universal habit and practice of mercantile men to endeavor to secure.'

The reasons for the strict enforcement of the warranty, in insurance, have frequently been commented on.

In *Douglas v. Scougall*, 4 Dow. 269, 276, Lord ELDON said: 'I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured; and I have endeavored, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine as far as, in the exercise of sound discretion, I have been able to do so. It is not necessary to inquire, whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable.' " (*The Caledonia*, 157 U. S. 132, 133.) (Italics ours.)

It is clear from these statements that, if a merchant who wishes to insure his goods is deprived of a warranty of seaworthiness in a contract of affreightment, he may find himself without any indemnity against loss. If it should turn out that the vessel was unseaworthy, his insurance would be void because the warranty of seaworthi-

ness in the policy would have been breached. For this reason the merchant must look to the shipowner to abide by his warranty of seaworthiness in the contract of affreightment. It follows that the reasonable construction to be given to the contract between petitioner and respondent is that the agreement to insure is conditioned upon the respondent supplying a seaworthy ship, and that the insurance provision does not modify in any way the shipowner's liability for failure to supply a seaworthy ship. Such a construction recognizes that the requirement as to seaworthiness is "based on the ground of public policy"—*U. S. Metals Refining Co. v. Jacobus*, 205 F. 896 (C. C. A. 2nd); cf. *The Kensington*, 183 U. S. 263, at page 269—and recognizes that this warranty is for "the benefit of commerce and the preservation of human life"—*Douglas v. Scougall*, 4 Dow. 269, 276. It is the warranty of seaworthiness in the contract of affreightment which "shall protect the owner of the cargo until his policy of insurance commences to run", per Mr. Justice BROWN in *The Eugene Vesta*, 28 Fed. 762, 763, cited and quoted with approval by this Court in *The Caledonia*, *supra*.

This Court has always been keenly alive to the importance of this personal warranty of seaworthiness and it has guarded it even against its being cut down by the provisions of the Limitation of Liability statute—*Cullen Fuel Co., Inc. v. W. E. Hedger, Inc.*, 290 U. S. 82; *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U. S. 139; *Pendleton v. Benner Line*, 246 U. S. 353.

It will not do to suggest that there is a common practice for a merchant and his underwriter to agree that the vessel which is to carry the goods may be considered seaworthy (R. 238). That practice is merely one of convenience, so as to relieve a merchant from the embarrassment of deciding whether to press his claim against the shipowner or

against the underwriter. *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 145, 149. The policies here which provided that the barge should be considered seaworthy as between the merchant and the underwriter also contained a provision that the insurance should not inure to the benefit of any carrier (Finding 44, R. 279). The system thus provided for in the policies is discussed in *Arnould on Marine Insurance* (12th Ed.), § 689, to which the editors of *Arnould* append a note:

“For some time past it has been the practice of underwriters on cargo not to set up the defense of unseaworthiness of the ship, *but to pay the loss and avail themselves by subrogation of the assured's remedies against the shipowner.* This practice does not modify the rule of law stated in the text” (p. 899). (Italics ours.)

Incidentally, clauses in a bill of lading evidencing a contract for the carriage of goods by sea in foreign trade which give the carrier the benefit of the cargo owner's insurance have now been declared by Congress to be ‘null and void and of no effect.’ *Carriage of Goods by Sea Act*, 46 U. S. Code, Sec. 1303, sub. 8; 49 Stat. 1208.

If, however, the underwriter on goods should be prevented from asserting a claim by subrogation for a loss due to unseaworthiness in consequence of a construction of an insurance clause such as that approved by the District Court, then the merchant would probably find himself confronted with either an inability to obtain insurance or a heavy increase in premium. In *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 145-149, this Court, speaking through Mr. Justice BRANDEIS, reviews the system adopted by merchants in dealing with a case of this character. The court discusses particularly the loan device mentioned in Finding 46 (R. 280). In concluding its discussion, this Court said:

“It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice” (248 U. S. at p. 149).

But we submit that the construction of the contract adopted by the District Court is clearly wrong. The whole agreement must be regarded and “must be construed according to the intent of the parties as manifested by the whole instrument, rather than by the literal meaning of any particular clause, taken by itself.” *Crossman v. Burrill*, 179 U. S. 100, at page 107, another charter party case. If the view of the District Court is adopted, then the whole agreement is not regarded, and under the construction of the District Court, the express warranty of seaworthiness becomes surplusage and the parties wasted their time when they inserted that clause in the contract. It is elementary that in interpreting any contract the intent of the parties controls. Obviously, the parties intended that both provisions should be given effect; otherwise they would not have been inserted in the contract. The natural construction to be placed upon the contract is that they intended that the insurance liability should not be made effectual until the barge-owner had fulfilled his obligation under the contract of affreightment. *The Eugene Vesta*, 28 Fed. 762, 763; *Kopitoff v. Wilson*, 1 Q. B. D. 377, 381. Following similar reasoning, the Courts have not found any difficulty in giving effect to both the warranty of seaworthiness and to insurance provisions.

The House of Lords in *Nelson Line, Ltd. v. James Nelson & Sons, Ltd.*, 1908 A. C. 16, affirming (1907) 1 K. B. 769 (C. A.), considered a case on all fours with the present case. In that case an agreement that shipowners should not be

“liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance” (at p. 19)

was coupled with another provision placing upon ship-owners the responsibility to take

“all reasonable means \* \* \* to provide against unseaworthiness” [(1907) 1 K. B. at p. 778].

Both the Court of Appeal and the House of Lords held that the provision first quoted did not relieve the ship-owner from the duty to provide a seaworthy vessel. Both Courts held that the shipowner was liable for the damage which resulted from his failure to do so. In his opinion in the House of Lords, Lord LOREBURN, *L. C.*, said:

*“If the words are considered by themselves, they seem to excuse the shipowners not merely from this, but from any imaginable liability, except such as by law cannot be underwritten. They run as follows: ‘The owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance.’*

*But the whole agreement must be regarded, and especially the context of the clause in which this alleged exemption occurs. The words in question do not stand by themselves. They are at the end of a very long sentence, the earlier part of which is wholly without effect if the last part means what the defendants maintain.*

\* \* \* \* \*

The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean some-

thing different. As Lord MACNAGHTEN said in *Elderslie Steamship Co. v. Borthwick*, 1905 A. C. 93, at p. 96, 'an ambiguous document is no protection.' That is the ground on which I rest my opinion" (1908 A. C. 16, 19). (*Italics ours.*)

In the same case in the Court of Appeal, (1907) 1 K. B. 769, FLETCHER MOULTON, *L. J.*, spoke of the "fundamental obligation to supply a seaworthy ship" (at p. 781) and COLLINS, *M. R.*, remarked that the insurance clause ought not to be applied as a limitation of the warranty of seaworthiness.

Precisely the same result was reached in *Sanbern v. Wright & Cobb Lighterage Co.*, 171 F. 449, 454, affirmed on opinion of the District Judge by the Circuit Court of Appeals for the Second Circuit, 179 F. 1021.

For the reasons which prevailed in these cases the insurance clause here ought not to be applied as a limitation on the warranty of seaworthiness.

The general principle is "that a shipowner desiring to protect himself from liability for the unseaworthiness of his ship must do so in clear and unambiguous terms, intelligible to ordinary business men." *Ingram & Royle, Ltd. v. Services Maritimes du Treport*, (1913) 1 K. B. 538, 546, 547, and the cases therein cited by SCRUTTON, *L. J.*

The foregoing cases are but applications of a settled rule of construction repeatedly announced by this Court, viz.:

"The warranty of seaworthiness is implied from the circumstances of the parties and the subject-matter of the contract and may be negatived only by express covenant." *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U. S. 82, 88.

In *The Caledonia*, 157 U. S. 124, at page 137, this Court said:

“As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel. *Steel v. State Line Steamship Company*, 3 App. Cas. 72; *Gilroy v. Price*, App. Cas. (1893) 56; *The Glenfruin* 10 P. D. 103; *Kopitoff v. Wilson*, 1 Q. B. D. 377; *Tattersall v. National Steamship Company*, 12 Q. B. D. 297; *Thames & Mersey Ins. Company v. Hamilton*, 12 App. Cas. 484, 490. If the exceptions are capable of, they ought to receive, to use the language of Lord SELBORNE in *Steel v. Steamship Company*, ‘a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken’” (157 U. S. at p. 137). (Italics ours.)

Again in *The Carib Prince*, 170 U. S. 655, at 659, this Court said:

“In other words, that where the owner desires the exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally so contract” (170 U. S. at p. 659).

To the same effect see in particular *The Framlington Court* (C. C. A. 5), 69 F. (2d) 300, at pages 303 and 304, where a charter party clause giving the ship liberty to sail without a pilot was held to be inconsistent with the warranty of seaworthiness and to afford the shipowner no defense where a failure to employ a local pilot rendered the vessel unseaworthy at the beginning of the voyage. See also *Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co.* (C. C. A. 2), 58 F. (2d) 175, where the Court, in speaking of an exception against unseaworthiness, held:

“Hence we hold that the exception did not cover a breach of the implied covenant, and that if the ship was in fact unseaworthy when she lifted the coffee, she was liable” (58 F. (2d) at p. 176).

In *Carver on Carriage of Goods by Sea*, 8th Ed., Sec. 105, page 182, it is said with reference to an insurance clause in a contract of carriage:

“Such a clause (where admissible) will not generally relieve the shipowner from liability for consequences of unseaworthiness of the ship, or of negligence of the crew.”

Compare *Price v. Union Lighterage Company*, (1904) 1 K. B. 412, 414; *The Titania*, 19 F. 101; *The Hadji*, 20 F. 875; *The Egypt*, 25 F. 320; *The Anna*, 223 F. 558; *The Turret Crown*, 297 F. 766.

A fair and reasonable effect should be given to the express warranty of seaworthiness. That warranty and the insurance provision can be readily reconciled within the established principles of interpretation applicable to this case, by holding (a) that the respondent is entitled to the benefit of the insurance clause only if, as, and when it has fulfilled its obligation under the express warranty of seaworthiness; or (b) that the insurance clause applies only to losses other than those arising from breach of the express warranty of seaworthiness. In either event, the result is the same, viz.; that the insurance clause has no application where there is a loss resulting from unseaworthiness.

It would be most unfair and against public policy if the respondent, after breaching the fundamental obligation of its contract to furnish a seaworthy vessel and to see that the vessel was maintained in that condition throughout the life of the contract, should, nevertheless, be able to require

the petitioner to insure the vessel owner against loss as the result of such breach and should be wholly exempt from liability for breach of his fundamental warranty of seaworthiness if no insurance against such type of loss was effected by the cargo owner for the benefit of the vessel owner.

We submit that the rules for the construction of such contracts as laid down by this Court, as well as the intentions sought to be expressed by the parties, require the construction that the two coordinate clauses of the contract, that is, the express warranty of seaworthiness and the insurance clause, should each be given effect within their respective spheres.

Much was said below of an alleged breach of the agreement on the part of the petitioner to insure the cargo for the account of respondent. This argument is without substance. There was no agreement on the part of your petitioner to insure the cargo for the account of the respondent *with respect to losses due to unseaworthiness of the barge*. Since unseaworthiness was the cause of the loss of the petitioner's cargo in this case, as found by the District Court, there was no breach of this agreement.

In Conclusion 14 (R. 284), the District Court says:

"The barge owner had the right to assume that the insurance clause in the contract of carriage meant just what it said, without any implied exceptions"

and adds that your petitioner

"has only itself to blame if it failed in its obligation to effect insurance for the account of the barge owner" (R. 284).

We submit that these statements of the District Court not only beg the entire question, but also are contrary to

the evidence which shows that the barge owner had his own insurance.

We make this last statement despite Conclusion 15 (R. 284) where the District Court states that the vessel owner having warranted the seaworthiness of the barges to your petitioner, would be most desirous of obtaining insurance to cover such a contingency, and that *the failure of your petitioner to obtain insurance for the vessel owner's account has left it without insurance* (Conclusion 14, R. 284).

Respondent's own witness in response to a query from the Court conceded that respondent had P. & I. insurance policies. When questioned by the Court as to what they covered, respondent's counsel stated: "They would be the policy interested in cargo damage" (R. 160). This same witness, a surveyor who made examinations of the barge on behalf of the P. & I. underwriters who insured respondent against liability for cargo damage (R. 154, 155, 156), conceded that "T. N. No. 73" was "entered with" his company (R. 155). From this uncontradicted testimony it is apparent that the *statement of the District Court that the vessel owner had been left without insurance by reason of the failure of cargo to obtain insurance for the vessel owner's account is contrary to the fact.*

Unfortunately the District Court, throughout its opinion and findings, seems to have confused cargo insurance with P. & I. (protection and indemnity) insurance. Cargo insurance is insurance on goods and is designed to protect anyone interested in the goods against loss due to damage which may be done to the thing insured; whereas P. & I. insurance is insurance against liability, usually the liability of a vessel owner for personal injury or damage to goods.

Both branches of the insurance clause contained in the contract of affreightment in suit (Finding 43, R. 278), relate to cargo insurance. The clause first provides that petitioner "shall insure *the cargo*"; secondly, it provides that respondent shall not be liable for "*any loss* in respect of which insurance has been or could have been effected." It was not contemplated, as we have shown above, that either of these provisions should relieve the respondent from its fundamental obligation to supply a seaworthy ship. Respondent must have been aware of that fact for it took out P. & I. insurance on its own behalf (R. 153, 154). There is no implied warranty of seaworthiness in a P. & I. policy. *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640.

In its Conclusion 7 (R. 281), the District Court unfortunately confused these two types of insurance, viz., insurance of a *res* and insurance against liability.

Respondent offered no evidence, nor is there any in this record, which would justify a finding (nor did the District Court make any) that petitioner could have obtained cargo insurance for the account of respondent which would have protected respondent in the case of a loss by reason of unseaworthiness. The obvious inference from this circumstance is that such insurance could not have been obtained. The reasons why such cargo insurance could not be obtained are that policies against loss and damage to cargo do contain a warranty of seaworthiness (*supra*, pp. 41-43).

The District Court was clearly wrong in holding that the insurance provision offered any protection to respondent with respect to this loss occasioned by its breach of its warranty of seaworthiness.

### Conclusion

Since the loss resulted from unseaworthiness, the decrees of both courts below should be reversed and a decree should be entered in favor of the petitioner against the respondent for its damages with interests and with costs both in this court and in the courts below.

D. ROGER ENGLAR,  
T. CATESBY JONES,  
LEONARD J. MATTESON,  
EZRA G. BENEDICT FOX,  
*Counsel for Petitioner.*

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# Supreme Court of the United States

OCTOBER TERM, 1940

No. 584

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COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

*vs.*

NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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## REPLY BRIEF OF PETITIONER

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D. ROGER ENGLAR,  
T. CATESBY JONES,  
LEONARD J. MATTHESON,  
EZRA G. BENEDICT FOX,  
*Counsel for Petitioner.*

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## REPLY BRIEF OF PETITIONER

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### Introduction

At the outset it may be observed that respondent elects to relegate to the last part of its brief a discussion of the questions relating to the presumption of unseaworthiness which arises from the sinking of a vessel without explanation. These questions were presented to this Court in the petition for certiorari as the grounds for the application for review by this Court; and it was in connection with these questions that conflicts exist between the decision of the Cir-

cuit Court of Appeals and decisions of this Court and decisions of other Circuits. Hence, we have assumed that they are the questions which this Court desires discussed first. We arranged our principal brief accordingly, and we shall follow the same arrangement in this brief.

At the end of its brief the respondent prays this Court to deal with this case as a trial *de novo*, that is to say, to examine the record and to reach findings of fact without regard to the findings below. This circumstance is eloquent of respondent's want of confidence in its case on the findings below.

Petitioner in its petition for this writ of certiorari presented only questions of law. No application for certiorari was made by or on behalf of respondent. Consequently, we assume that consideration by this Court will be confined to the errors of law assigned by the petitioner. *The Maria Martin*, 12 Wall. 31, 40; *Warner Co. v. Pier Co.*, 278 U. S. 85, 91; *Oxford Paper Co. v. The Nidarholm*, 282 U. S. 681, 684—all admiralty cases. This would seem to be especially true with respect to cases coming up from the Second Circuit where the old doctrine of a trial *de novo* in admiralty cases has been modified by Rule XXXVIII, sec. 3, of the Circuit Court of Appeals for that Circuit (see Appendix for text of rule). But in view of respondent's prayer for a new trial in this Court, we have during the discussion in this brief reviewed some of the testimony for the purpose of showing that the findings and conclusions of the District Court as to unseaworthiness are fully supported.

**Respondent's Statement of Facts Differs Materially From, and in Some Instances Is at Variance With, the Findings of the District Court and Is Otherwise in Conflict With the Proof.**

The most important of the disagreements between respondent's "Statement of Facts" and the findings of the District Court (the Circuit Court of Appeals made no independent findings) are:

Page 2.\* Respondent lays emphasis upon the rate of loading of the barge to establish that the cause of the sinking was negligence in loading. Although the Court found that the rate of loading was constant, it also found that the distribution of the load was "a matter of speculation only" (Finding 34, R. 275). This was due to the fact that the testimony of respondent's witness, the mate, was unreliable (Finding 40, R. 278). As to the "estimates and computations" of respondent's experts, the Court found that they "were not well founded and could not form a satisfactory basis for determining whether at the time of the accident the after tanks had been overloaded, through the negligence of the mate of the barge" (Finding 35, R. 275).

Pages 3 and 4. Respondent states that the barge was inspected by one Carpinello and his assistant, Lanza, who "represented the cargo interest." Neither of these men represented your petitioner. They represented the United Molasses Company, from whom your petitioner purchased the molasses. Lanza was at all times on board the "Athel-sultan"—he was never on board "No. 73" (R. 165, 168).

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\* This and similar subsequent references are to the pages of respondent's brief.

Carpinello, who was on board the "No. 73," never made any examination to determine the seaworthiness of the barge. His inspection was merely made to ascertain the cleanliness of the tanks (R. 175), as would naturally be the case with a representative of a seller whose duty was to see to it that the molasses delivered to the buyer was not contaminated by the receptacle provided by the buyer. Neill, respondent's man who went around with Carpinello, admitted that he, Neill, was not competent to test the condition of such a barge as "No. 73" for seaworthiness (R. 71).

Pages 4-8. Respondent asks this Court to find upon the testimony of its experts that the barge was negligently loaded.

We have called the Court's attention to Finding 35 (R. 275) where the District Court found that the testimony of these experts "could not form a satisfactory basis" for that purpose.

Concerning the testimony of its expert Haight, upon whom respondent especially relies, the Court found that his conclusions rested upon an assumption of another of respondent's experts and then said: "If it is an erroneous assumption, and I think it is, then all of Captain Haight's figures are valueless, and we are left further in the dark on the issue of overloading" (Finding 41, R. 278).

Respondent at page 5 of its brief makes much of the slump referred to by its witness the mate and contends that the mate's testimony concerning it indicates that the mate was negligent. The Findings, however, are:

"Reasonably exact statements of the times when pumping started and was stopped have been given, 9:05 and 1:10 A. M. respectively. However, the most

important element, the time of the change-over from the forward to the after tanks, is stated to have been some time between 11 and 11:30 P. M. \* \* \* With the molasses being pumped into the barge at a rate close to 40,000 gallons per hour, the time of the change-over from the forward to the after tanks is most important. On the mate's testimony, which is the only testimony on this point, we have a spread of half an hour" (Finding 31, R. 274).

"The decision on the issue of whether or not the mate was negligent in loading the after cargo tanks of the barge, requires definite proof of the quantity of molasses in the various tanks when the mate was about to shut off the after tank valves and begin reloading the forward tanks. That was the time he felt a heavy jar, followed by the first slump at the stern. Apparently this took place about 1:05 A. M., October 24th. The loading of the forward tanks had started at 9:05 P. M., October 23rd; the ship's pumps were stopped soon after the accident at about 1:10 A. M. The captain of the barge and his mate climbed aboard the ship about 1:07 A. M." (Finding 32, R. 274).

On this issue of overloading, as we have just shown, the Court found that it was left in the dark; but even if it should be assumed that overloading had been established, it is to be noted that the Court found:

"Petitioner" alleges that the sinking was caused by the *negligence* of the mate in overloading the after tanks of the barge. I do not find the evidence sufficient to establish this as a fact" (Finding 28, R. 273). (Italics ours.)

Respondent states at page 6 of its brief, that after the sinking, in the course of raising the sunken barge, the salvors inspected the boat and found no escape of molasses

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\* Respondent in this Court.

to indicate any leakage in the hull. Reference is made to R. 271. An examination of Findings at R. 271 shows that the foregoing statement incorrectly summarizes what the Court found. The Court found that the diver who examined the barge while she was sunk, found that she was "lying about two-thirds *submerged in the mud* and canted over on one side at an angle of about 45 degrees. He could see no evidence of leakage" (italics ours) (Finding 21, R. 271). The Court in Finding 23 (R. 271) found that none of the surveyors "could definitely ascertain what caused the barge to sink" (R. 271).

And later, in Finding 25 (R. 272), the Court found:

"The barge was in such a battered condition after the salvage operations, that the inspections later made in dry-dock were necessarily inconclusive. All that could be said of them is that they failed to disclose the cause of the sinking and in view of the condition of the barge nothing more could have been expected" (Finding 25, R. 272).

Obviously, with the boat submerged in the mud, and considering the battered condition of the barge, the testimony of the salvors is of little value and the District Court properly treated it so.

Respondent says, at page 8 of its brief, that "There is not in the record a scintilla of affirmative proof that any sea water found its way into the barge before the sinking occurred, or that the sinking was due to unseaworthiness in any respect." Respondent apparently overlooks the fact that its witness Hansen said that when he examined the barge on drydock, after she was raised by salvors, "The after peak tank was about half full of water, \* \* \*" (R. 115). How this water got into the after peak has never been clearly divulged. The after peak was a closed compartment, and the hatch leading to it was "dogged down"

(R. 64). When the hatches to the peak tanks are fastened down, these peak tanks are "air and watertight" (R. 96). "The diver testified that the peak tank hatch covers were closed when he descended to the barge" (Finding 24, R. 272), and "nothing from the diver's testimony would indicate that he had opened any of the peak tank hatches" (Finding 25, R. 272). The after peak tank should not have leaked, even with the barge submerged, if the rivets had been tight. Thus respondent has not shown how the after peak tank became half full of water. The water did not enter the peak tank because of the salvage operations, because Hansen said that the salvage damage was in the area of the cargo spaces (R. 117). True, there was deck damage, but there is no evidence in the record upon which a finding can be made that water leaked into the after peak tank through the deck, and not through the defective rivets. Hansen admitted that there were about 500 slack rivets in the barge (R. 118). Holden, who made an inspection for the United States P. & I. Agency, the insurance company which was on one of the policies which covered the liability for cargo damage (R. 160), although he attempted to belittle the amount of the leak (R. 161), admitted that there were a number of weeping rivets (R. 156-158). Lynner, another of respondent's witnesses, admitted that the amount of leakage from the rivets depends on the position of the rivets (R. 122). Your petitioner's witness Burke testified that there were some 1500 short rivets in the barge (R. 193), that the only way to determine the amount of leakage from these rivets was by a proper hammer test, and that with the barge, smeared with molasses, he "could not tell [whether the short rivets were leaky] on that job without testing them and you would have to test that from the inside and she wasn't clean enough for that" (R. 194). We submit that, since respondent is unable to show either how the water got into the peak tanks

or any other cause for the sinking of the barge, its attack upon the District Court for saying "I find that this loss resulted from unseaworthiness" (Conclusion 1, R. 280) is groundless. Indeed, if inferences are to be indulged in, as clearly they must be, the District Court's reliance upon the presumption, approved in many cases, that when a barge sinks without adequate explanation, she is unseaworthy, is fully justified.

Incidentally, it is of interest to note that respondent had had prior trouble with leakage of water into the after peak tank of this barge. For example, in May, 1937, or only five months before this loss, water was found in the after peak tank, admittedly due to leakage through the hull (R. 43, 45). The barge was thereafter sent to a repair yard, and it is claimed that she was repaired in that respect by welding a "hole and thin pits in tank bottom" (Ex. 2, R. 228). As Mr. Bagger pointed out, such a condition was "an indication that corrosion and pitting was taking place in the vessel" (R. 208) and "would be a warning that corrosion was setting in and that conditions would have to be very carefully watched" (R. 208). She had not been in drydock again subsequent to that time (R. 45). It is to be remembered that the original thickness of the plates was only about  $\frac{3}{8}$ ths of an inch (R. 36, 209) and that they get thinner with age. This barge was about twenty years old (R. 36, 209).

Page 8. Respondent refers to testimony as to the condition of the barge at her drydocking five months before the sinking. We have dealt with this subject fully under Point V of our principal brief and we now mention the subject again solely for the purpose of saying that respondent has failed to direct this Court's attention to any testimony to the effect that the barge was properly inspected for leaks before she began to load your petitioner's cargo.

## I.

**Respondent's argument concerning the burden of proof with respect to the asserted liability for the loss of the cargo proceeds upon a false premise, viz., that petitioner's claim is based upon a liability for negligence. The liability asserted is not for negligence; it is for failing to supply a seaworthy vessel.**

Page 25. Respondent says: "Thus in addition to its burden of proof under the general rule, petitioner as bailor had the burden of proving the specific negligence on which it sought to recover—unseaworthiness." This statement contains two fundamentally unsound assumptions.

(1) The assumption that petitioner's cause of action rests upon the obligation of the carrier as bailee. As pointed out in our principal brief (pp. 11, 12), this cause of action does not rest upon a bailor-bailee relation, but upon the breach of a warranty of seaworthiness. As put by Scrutton: The liability of a shipowner in the position of the respondent arises "not from the shipowner's position as a common carrier, but from his acting as a shipowner." *Scrutton on Charter Parties*, 14th Ed., p. 100; *Kopitoff v. Wilson*, 1 Q. B. D. 377, 382. See also *The Southwark*, 191 U. S. 1, 14.

(2) The assumption that the gravamen of your petitioner's cause of action is negligence. This Court in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 426, made it plain that the liability for the breach of an absolute warranty of seaworthiness, such as is involved in this case, does not depend upon negligence. This Court there said (p. 426):

"The warranty is absolute that the ship is in fact seaworthy at that time [the beginning of the

voyage], and *the liability does not depend upon* the knowledge or ignorance, the care or *negligence* of the shipowner or charterer." (Italics ours.)

The question in the case is not whether respondent was negligent, but whether respondent's vessel was unseaworthy. We have shown in our principal brief—and it has not been questioned by anyone, even by the Circuit Court of Appeals—that when a vessel sinks without known cause, there is a presumption of unseaworthiness. Since unseaworthiness is unfitness to encounter ordinary perils, we submit that, when a vessel sinks in smooth water from an unknown cause, she proves herself unfit to meet ordinary perils and is, therefore, unseaworthy.

Respondent at pages 23 and 24 of its brief cites cases concerning the bailor-bailee relation. The cases, with the exception of the case of *Robert A. Manroe Co. v. Chesapeake Lighterage, etc. Co.*, 283 F. 526 (D. C. Md.), have no relation to the subject under discussion. Even in a bailee case, however, in order to overcome a *prima facie* case, there must be an "absence of circumstances permitting the inference of lack of reasonable precautions" (*Southern Ry. Co. v. Prescott*, 240 U. S. 632 at p. 640).

With respect to *Kohlsaat v. Parkersburg, etc. Co.*, 266 F. 283, 285 (C. C. A. 4), respondent omitted the sentences which follow the passages it quotes. They are as follows:

"True, it is often said that when the plaintiff proves delivery of the property to the defendant and that it has not been returned as agreed, the burden of proof shifts to the other side. These facts may make a *prima facie* case, or, as the court below puts it, give rise to a presumption of negligence; but, whatever the form of expression, the meaning is always the same, namely, that it then becomes the defendant's duty to go forward with the evidence

*and explain how the damage occurred.”* (Italics ours.)

So also here, since the barge sank without known cause, and the respondent had not gone forward with the evidence and explained how the loss occurred, the District Court found that the barge was unseaworthy. Failure of the respondent to offer evidence sufficient to amount to proof of the fact which it sought to establish, cannot be charged to your petitioner.

*Robert A. Munroe Co. v. Chesapeake Lighterage, etc. Co.*, 283 F. 526, 529, also cited by respondent at page 25 of its brief, squarely sustains our position. In that case the Court held that a vessel owner was liable for a breach of its implied warranty of seaworthiness, although it had offered (283 F. 527) “testimony that the scow was seaworthy and there is nothing to the contrary, except that on a quiet summer’s night, in a sheltered slip, she turned turtle.” In that case the vessel owner called surveyors to “testify that they found injuries to one of her corners extending well below the water line, and which they do not think could have resulted from her upsetting, but which could have been caused by some heavy moving object striking her, and in their judgment were” the cause of the sinking. Nevertheless, Judge ROSE held that the vessel owner had not rebutted the presumption of unseaworthiness, just as the District Court in the present case found that the evidence relating to negligence in loading, and the testimony of the surveyors, had not rebutted the presumption of unseaworthiness. The District Court there, as was the case with the District Court here, found that the testimony was wholly insufficient to show what caused the barge to sink.\*

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\* In passing it may be observed that in the *Chesapeake Lighterage* case, the Court permitted limitation of liability. In so far as that portion of the case is concerned, the decision was overruled by this Court in *Callen Fuel Co. v. Hedger Co.*, 290 U. S. 82.

Respondent's references at page 25 of its brief to the fact that your petitioner alleged unseaworthiness in its claim are beside the point. In admiralty the common law rule of variance does not apply. *Dupont, etc. v. Vance, et al.*, 19 How. 162, and numerous later cases. The complete answer is, however, that the unexplained sinking did establish unseaworthiness as alleged.

Realizing this situation, respondent attempted in the District Court to establish an explanation of the sinking, and begins at page 31 of its brief to argue that it succeeded.

Indeed, at page 32 of its brief, respondent goes so far as to say. "The external force which was affecting 'T. N. No. 73'—the filling of the stern tanks, was proved without any dispute." We have already called this Court's attention to the circumstance that the District Court gave most careful consideration to respondent's evidence, and found that there was not sufficient evidence to establish that the negligence of the mate was the cause of the sinking (Finding 28, R. 273).

The American cases cited at pages 12-15 of our main brief demonstrate that on these facts the presumption of unseaworthiness continues. Even the Circuit Court of Appeals states "There can be no question that they amply establish the presumption" (R. 295). We submit that the Circuit Court of Appeals was in error when it stated the English cases support a contrary view (R. 294). All of the English cases show that in those cases *proof* of an external cause of loss was required to *displace* the presumption of unseaworthiness. In *Lindsay v. Klein*, 1911 A. C. 194, 205, the case most relied upon by the Circuit Court of Appeals, Lord SHAW of Dunfermline in his speech says that the presumption persists until it is "overborne by

*proof* that the loss or damage to the vessel occurred from a cause or causes of a different character.” (Italics ours.) So also in *Pickup v. Thames & Mersey Marine Insurance Co.*, 3 Q. B. D. 594 (1878), Lord THESIGER says (p. 604): “\* \* \* it was also *proved* that there was weather which might possibly account for the loss which took place.” (Italics ours.) In *Ajam Goolam Hossen & Co. v. Union Marine Insurance Company, Ltd.*, 1901 A. C. 362, 366, the Privy Council said: “But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship *are proved*, those facts must also be considered \* \* \*” (Italics ours). Here no fact was *proved* which was inconsistent with loss by unseaworthiness. On the contrary, the District Court definitely found that there was no *proof* that the loss of the vessel had been caused by negligence (Finding 28, R. 273), or, in fact, by any cause other than unseaworthiness (Conclusions 1, 2, R. 280).

At page 33 of its brief, respondent asserts that “in practically all of the fifty or more cases cited in petitioner’s brief on pages 12-39” in connection with the rule that proof of unexplained sinking of a vessel gives rise to a presumption of unseaworthiness, there was affirmative proof of defective conditions constituting “facts on which the courts inferred unseaworthiness.” It is true that the facts in some of the cases cited did include references to specific defects. A reading of such cases, however, discloses that the principle of law is not restricted or confined to such state of facts, but is general and unqualified in scope. *The Jungshored*, 290 F. 733, was a loading case, just as the present case is a loading case, and in that case it appears that the barge sank “without warning” (272 F. at p. 123), or as Judge HUGH expressed it, “‘she just faded away’ without explanation, then or since” (290 Fed. 735). See also *U. S.*

*Metals Refining Co. v. Jacobus*, 265 F. 896, 897 (C. C. A. 2). In addition, see *Robert A. Monroe Co. v. Chesapeake, etc. Co.*, 283 F. 526 (D. C. Md.). In short, in all cases of this character the courts have recognized that sinking without known cause is sufficient evidence to require the inference of a leak and of unseaworthiness. Furthermore, it is to be noted that in making this argument, respondent is in effect attacking the ruling made by the Circuit Court of Appeals in this very case, viz., that the presumption was here available (R. 294). As we pointed out at pages 15-29 of our principal brief, the Circuit Court of Appeals here recognized the presumption, but ruled that it did not continue in effect and was insufficient to sustain the burden of proof upon the respondent's offering testimony as to other causes of sinking, even though such testimony was found by the District Court to be unreliable, not well founded, and inadequate to establish any cause for the barge's sinking.

We have fully discussed in our principal brief the matter argued at pages 29, *et seq.*, of respondent's brief, and we shall add little to what we have said in our principal brief. We do wish to mention again, however, that there is evidence that sea water may have entered this barge through leaky rivets (*supra*, pp. 6-8). True, there is no evidence of the quantity of water which entered the barge; for, as was pointed out by the witness Burke, it was impossible to state the quantity, because no one had made a sufficient examination of the rivets with a hammer to test how much could have gotten into the barge through these leaky rivets (R. 194). The case is squarely within the ruling of this Court in *The Edwin I. Morrison*, 153 U. S. 199, where this Court definitely held that in the absence of such a test the vessel owner must take the consequences of being unable to establish seaworthiness. It should be recalled that in *The Edwin I. Morrison* there was abundant evi-

dence of bad weather. At 153 U. S. 205 it is said that the vessel "encountered a strong northwest gale"; on the following pages it is said that there was "a very bad sea flooding the decks continually and washing everything movable about" and that "the weather continued severe during almost the entire voyage."

Page 29. *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416, has nothing to do with the presumption of unseaworthiness here involved. Mr. Justice STONE there said (p. 421 of 270 U. S.):

"It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is 'presumed negligence.' *Hall & Long v. Railroad Companies*, 13 Wall. 367, 372. But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes. See *Railroad Co. v. Reeves*, 10 Wall. 176, 189; *Railroad Co. v. Lockwood*, 7 Wall. 357, 376; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 181."

Petitioner's cause of action does not rest on "presumed negligence," or any other kind of negligence; it rests upon a breach of the warranty of seaworthiness. When a vessel sinks without any facts being proved to explain the loss, the breach of such a warranty has been established (Conclusion 1, R. 280). Moreover an admiralty judge is a trier of facts and his findings should not be disturbed unless clearly erroneous.

Page 31. Respondent contends that the presumption of unseaworthiness "arises only when all the known facts

offer no other possible explanation than the inference of unseaworthiness." The rule is not so limited in scope. See in particular *Pendleton v. Benner Line*, 246 U. S. 353, discussed at page 17 of our principal brief. See also the *Chesapeake Lighterage* case, *supra*. We submit, however, that under the findings below, even applying respondent's erroneous rule, the barge was unseaworthy.

Page 31. At this point, and also under the Third Point of its brief, respondent argues that the loading of the barge constitutes an "external force" which would prevent the presumption of unseaworthiness from coming into operation. No such qualification of the rule was recognized in *The Jungshoved*, 272 F. 122, aff'd 290 F. 733 (C. C. A. 2), a loading case. Furthermore, such a contention ignores the well recognized rule that improper loading of a vessel itself constitutes unseaworthiness. In *Oxford Paper Co. v. The Nidarholm*, 282 U. S. 681, another charter party case, this Court, speaking through Mr. Justice STONE, said, at page 684:

"By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel which would otherwise have been implied. *The Caledonia*, 157 U. S. 124, 130, 131. This warranty extends to unseaworthiness of the ship due to faulty stowage of cargo, *Corsar v. Spreckles*, 141 Fed. 260, even though the charterer himself, subject to supervision of the captain, loads the vessel, *The Seguranca*, 250 Fed. 19. The charterer is entitled to rely on the master, in the exercise of his expert knowledge and judgment, to control the disposal of cargo so as to avoid dangers to it from any consequent unseaworthiness of the vessel. *Olsen v. United States Shipping Co.*, *supra*; *The Oakley C. Curtis*, 4 F. (2d) 979; certiorari denied, 267 U. S. 599; *The Dana*, 190 Fed. 650; *cf. Corsar v. Spreckles*, *supra*; *The Thames*, 61 Fed. 1014."

See also to like effect:

*The Benjamin Noble*, 244 F. 95 (C. C. A. 6), aff'd  
sub nom. *Capitol Transp. Co. v. Cambria Steel*  
*Co.*, 249 U. S. 334;

*The Oneida*, 108 F. 886 (S. D. N. Y.);

*The Colima*, 82 F. 665 (S. D. N. Y.).

## II.

**The insurance clause does not excuse the respondent from liability for losses arising from unseaworthiness.**

Page 3. Respondent says that petitioner "is now, admittedly, prosecuting this suit on behalf of its underwriters." If this observation is relevant, it is equally relevant to say that respondent is representing the vessel's P. & I. underwriters. See R. 153-154.

Page 3. Respondent states: "No evidence was offered by petitioner to show that insurance, including coverage of losses due to unseaworthiness, could not have been obtained for respondent's account upon payment of the necessary premiums." This implies that the burden in this respect was on the cargo owner. The fact is that the burden was on the vessel owner to establish that the insurance clause, an exception in its contract of affreightment, which provided that respondent shall not be liable "for any loss in respect of which insurance \* \* \* could have been effected," constituted a defense with respect to a loss caused by its breach of the warranty of seaworthiness. The District Court granted respondent exemption on these words (Conclusion 6, R. 281). We submit that, in

so doing, the District Court extended the meaning of these exceptive words beyond their natural import. The rule is that words of an exception against liability are to be given a restricted application. This is especially true when it is sought to construe the exemption by way of modification of the warranty of seaworthiness (*post*, pp. 21-22).

Page 13. Respondent says that "Petitioner's claim was dismissed in the District Court \* \* \* for petitioner's failure to insure the cargo for respondent's account." This statement gives an erroneous impression. The claim was not dismissed because of cargo's breach of the agreement to insure. The District Court specifically held that the carrier "is exonerated from liability 'for any loss in respect of which insurance \* \* \* could have been effected' " (Conclusion 6, R. 281).

Page 14. Respondent says: "Ordinary Marine policies of this character cover losses due to unseaworthiness." The two cases cited for this proposition do not support respondent. Both of these cases relate to P. & I. insurance and not to cargo insurance. Admittedly there is no implied warranty of seaworthiness in a P. & I. policy. Indeed in *Hanover Fire Insurance Co. v. Merchants' Transp. Co.*, 15 F. (2d) 946 (C. C. A. 9), one of these cases, the Court pointed out (at p. 948) that "The object of this form of insurance [*i. e.*, P. & I. insurance] is to afford protection to ship-owners *in addition* to that afforded by the ordinary marine policy \* \* \*." It was because of this difference between cargo insurance and P. & I. insurance that the Court held in that case that that P. & I. insurance covered losses due to unseaworthiness, citing *Eagle Star, etc. Ins. Co. v. Geo. A. Moore & Co.*, 9 F. (2d) 296 (C. C. A. 9). The other case cited by respondent, *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640 (C. C. A. 4), *rev'g* 10 F. (2d) 563 (D. C. Md.), was decided adversely to the assured by the District Court on

the ground that the barge was unseaworthy and for that reason that the insurance was avoided because of the breach of the warranty of seaworthiness. The Circuit Court of Appeals, in reversing the District Court, 20 F. (2d) 640, 643, held that the District Court would have been correct in its decision if the claim had been under the cargo feature of the insurance, but since the claim was under the P. & I. feature, the decision was incorrect, because there is no warranty of seaworthiness in a P. & I. policy. We submit that both of these cases support our position, because here the insurance contemplated by the insurance clause of the contract of affreightment related only to *cargo* insurance (Finding 43, R. 278). It was a mere indemnity against loss and did not cover legal liability. An indemnity against loss is always subject to a warranty of seaworthiness. *The Caledonia*, 157 U. S. 124, 132. The cases are collected and considered by Judge SOPER in *Sorenson v. Boston Insurance Co.*, 10 F. (2d) 566. The Circuit Court of Appeals for the Fourth Circuit, 20 F. (2d) 640, did not disagree with Judge SOPER's views concerning a warranty of seaworthiness on cargo insurance, whether it be a time or a voyage policy; its disagreement with Judge SOPER related to the application of the warranty of seaworthiness to a P. & I. policy.

At page 15 and page 21 of its brief, respondent again cites the *Hanover Fire Ins. Co.* case and *Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640. In addition, it cites *Great Lakes Corp. v. Interstate S. S. Co.*, 301 U. S. 646. In the last mentioned case the insurance effected was multiple in nature. For example, the insurance was (1) on cargo owned by the assured; (2) on the assured's liability to others in respect of cargo of any kind, etc.; and (3) to indemnify and hold harmless the assured against "all the risks, perils and liabilities which by law a common carrier by land or

water assumes" (301 U. S. at p. 650). In the present case the insurance called for by the contract was on "cargoes" only (Finding 43, R. 278). It was to be a mere indemnity against loss, hence such insurance was subject to the warranty of seaworthiness. *The Caledonia*, 157 U. S. 124, 132. *The Great Lakes* case not only involved a policy of vastly wider scope than that now before the Court, but it also involved a loss from collision, a marine peril. It had nothing to do with unseaworthiness.

Pages 17 and 18. Respondent's whole argument boils down to the assertion that because petitioner undertook to obtain cargo insurance on the molasses for account of respondent, and petitioner failed to procure such insurance, respondent is not liable for the loss of the molasses, even though the cause of the loss of the molasses was the barge's unseaworthiness. Respondent argues that, although he may be *responsible* for failing to supply a seaworthy barge, he is *not liable* for such failure, because your petitioner failed to procure insurance to protect respondent "against any liability for loss or damage to the cargo" (Respondent's Brief, p. 18). The difficulty with this argument is that it is not supported by the facts. Your petitioner did not agree to procure insurance to protect respondent *against liability* for loss or damage to the cargo, *i. e.*, P. & I. insurance. What your petitioner agreed to do was to insure *the cargoes* for account of respondent. Insurance on cargoes, as we have said above, is always subject to a warranty of seaworthiness. The risk insured by the underwriters under such a policy does not begin to run until the vessel breaks ground. *The Eugene Vesta*, 28 F. 762, 763. Prior to that time, the owner of the cargo must look to the warranty of seaworthiness and it was for that reason that the warranty was inserted into the contract of carriage. *The Caledonia*, 157 U. S. 124, 132. The

language of the latter part of the insurance clause which provided what the legal result shall be in the event that petitioner failed to take out insurance for the account of respondent, viz., that respondent should not "be liable for any loss in respect of which insurance has been or could have been effected" (R. 278), does not in any way alter the fact that the insurance referred to was cargo insurance. This last quoted language merely states the exception from liability to which the respondent is entitled in the event petitioner fails to take out insurance as provided in the first part of the clause.

Page 19. Respondent says: "Many of the cases cited by petitioner \* \* \* comment on the fact that a private carrier might, by contract, eliminate the warranty of seaworthiness. *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U. S. 82, 88; *The Turret Crown*, 297 F. 766, 775; *The Framlington Court*, 69 F. (2d) 390, 393." Of course! No one disputes that proposition. But here the private carrier did not, by contract, eliminate the warranty of seaworthiness. On the contrary, so that there could be no misunderstanding on this point, and, perhaps to prevent the interpretation of the insurance provision for which respondent now contends, it expressly covenanted that its vessel was seaworthy and that it would "maintain the barge in such condition during the life of this contract" (Finding 42, R. 278). In *Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82, 88, which involved an oral charter party of a barge, it was held that even the implied warranty "may be negatived only by express covenant."

If a vessel owner wishes to contract against supplying a seaworthy vessel, he must do so in plain language. As this Court said in *The Carib Prince*, 170 U. S. 655, at page 659, in referring to *The Caledonia*: "The principle

upon which the ruling rested was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage." Yet respondent urges that its ambiguous cargo insurance clause is sufficient to nullify the express warranty of seaworthiness. As we pointed out at page 49 of our main brief, the Circuit Court of Appeals for the Fifth Circuit held in *The Framlington Court*, 69 F. (2d) 300, a case involving a private carrier, that a clause giving the vessel the liberty "to sail without pilots" (p. 304) did not restrict the warranty of seaworthiness in the charter party and afforded no defense to a loss due to unseaworthiness at the beginning of the voyage arising from failure to employ a local pilot.

Pages 20-22. The attempts of respondent to brush aside *Nelson Line, Ltd. v. James Nelson & Sons, Ltd.*, 1908 A. C. 16, and other cases cited by us at pages 48-50 of our principal brief, with the erroneous assertion that the insurance agreements in those cases "were quite different from the petitioner's agreement herein to provide insurance for respondent's account" (p. 22) fails because the distinction which respondent attempts to make between the clause here and the clauses in those cases does not stand analysis. In the *Nelson Line* case, as here, the shipowner asked the Court to give an insurance provision a construction which would leave the warranty of seaworthiness without effect. The House of Lords refused to do so. Lord LOREBURN in plain terms said that a construction should not be given to the insurance agreement which would leave the shipowner's express warranty of seaworthiness without effect (Petitioner's Principal Brief, p. 47). Since the

subject of discussion in the *Nelson Line* case was the warranty of seaworthiness, it makes no difference whether the contract of affreightment in that case was one of a common carrier or of a private carrier. The law implies the same warranty of seaworthiness on the part of a shipowner when he is acting as a private carrier as it does when the shipowner is operating as a common carrier. *Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82, 88.

Page 22. Respondent says: "But there is no proof or admission in the case that this cargo of molasses was insured by respondent." This is literally and exactly true. We have never contended that "*the cargo*" was so insured. What we do say and said at pages 52 and 53 of our main brief, was that the respondent had *P. & I. insurance covering its liability* for loss of cargo caused by unseaworthiness. Opposing counsel admittedly represent P. & I. underwriters (R. 154, 160). The P. & I. insurance represented by our opponent was effective irrespective of the warranty of seaworthiness (*supra*, pp. 18-19). Not so with the cargo insurance which he contends the petitioner should have taken out (*supra*, pp. 19-20).

During the course of the argument, both under Points I and II, respondent refers to our contention that the existence of the implied warranty of seaworthiness in a contract of affreightment is a matter of public policy. Respondent then confuses the issue by suggesting that we contend that the insurance provision is invalid because of public policy. We have never contended that this case involves a common carrier relation; nor have we contended that the insurance clause is invalid. What we do contend, is that in construing a clause such as the insurance clause contained in the contract of affreightment here under consideration, it should be kept in mind that the warranty of seaworthiness exists because of sound public policy, and

that no construction should be given to the clause which will negative a shipowner's obligation under that warranty, whether express or implied, if such a construction can be avoided. Certainly when the warranty is express, as is the case here, it would be opposed to the public policy mentioned in the cases cited at page 44 of our principal brief to give the insurance clause a construction which would destroy the warranty.

### III.

**In its Third Point, respondent virtually concedes that both courts below erred in their legal conclusions on the facts as found, since it asks this Court to try the case *de novo*.**

In its Third Point, respondent asks this Court to review the findings of the courts below and to treat the case as a trial *de novo* (p. 37), although it made no application itself for certiorari. *Oxford Paper Company v. The Nidarholm*, 282 U. S. 681, 684, and other cases cited *supra*, page 2. We submit that in asking for new findings from this Court, the respondent concedes that the law points below were erroneously decided and that for respondent to succeed here, it must secure from this Court new findings. Such a request in any case on certiorari in this Court is extraordinary; but when we remember that the Circuit Court of Appeals commented (R. 293) upon the great care and thoroughness with which the District Court examined the evidence, it is little short of astounding that the present request should have been made by respondent.

In its statement and argument respondent challenges our sincerity and accuses us of misstatements. These charges are unjustified in every particular. As we assume

that this Court is not interested in the views of the respondent on these subjects, we shall not dignify them with further comment.

### Conclusion

The error of the Circuit Court of Appeals was its failure to give full effect to the presumption that when a vessel sinks without any apparent cause, she is unseaworthy. There was never any doubt concerning the fact that the vessel sank in smooth water, without any external contact. Respondent has not proved that the negligence of the mate caused the sinking (Finding 28, R. 273). Indeed, the testimony it offered left the District Court to sheer guesswork in its effort to make anything out of the testimony of respondent's witnesses (Findings 32-41, R. 274-278).

The District Court was clearly wrong in extending an exceptive provision in a contract of carriage beyond its natural meaning so as to destroy the effect of a warranty of seaworthiness.

Respectfully submitted,

D. ROGER ENGLAR,  
T. CATESBY JONES,  
LEONARD J. MATTESON,  
EZRA G. BENEDICT FOX,  
*Counsel for Petitioner.*



**APPENDIX**

United States Circuit Court of Appeals, Second Circuit,  
Rule XXXVIII, Section 3, Appeals in Admiralty:

"3. If the appellee desires other or further relief than that granted by the decree he must within ten days after the appellant has served his Notice of Appeal file with the clerk of the district court and serve on the proctor for the appellant an assignment of errors."



IN THE  
Supreme Court of the United States  
~~OCTOBER TERM, 1940.~~

~~1940.~~  
OCTOBER TERM, 1941.

No. 14.

---

COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

against

NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

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**PETITIONER'S BRIEF ON REHEARING.**

---

T. CATESBY JONES,  
LEONARD J. MATTESON,  
EZRA G. BENEDICT FOX,

*Counsel for Petitioner.*



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1940.

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COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

—against—

NEW YORK TANK BARGE CORPORATION, as Chartered  
Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

**PETITIONER'S BRIEF ON REHEARING.**

---

***Statement.***

A statement of the questions of law presented in the petition for a writ of certiorari and the references to the decisions of the lower courts in this case are to be found at pages 1 to 9, inclusive, of the brief submitted on behalf of the petitioner on the original hearing of this appeal in this Court. Here, as in that brief, the cargo owner, Commercial Molasses Corporation, will be referred to as "petitioner" and the New York Tank Barge Corporation, the chartered owner of Tank Barge "T. N. No. 73", will hereinafter be referred to as "respondent".

This case was orally argued before this Court on March 13 and March 14, 1941. On April 14, 1941, this Court entered an order as follows:

*"Per curiam:* The judgment is affirmed by an equally divided Court."

Thereafter, petitioner sought a rehearing; and on the 28th day of April, 1941, this Court entered an order granting the petition for rehearing and directing that the judgment of the Court entered on the 14th day of April, 1941, be vacated and that the case be restored to the docket for a reargument and assigned for a hearing on Monday, October 13, 1941.

This brief is filed in relation to questions which members of the Court addressed to counsel during the first argument.

It was suggested in a question directed to counsel for the petitioner that the situation here involved was in substance that although the vessel had sunk in calm weather, without any external contact, yet the evidence adduced by the respondent contained a possible explanation for the sinking of the vessel, other than unseaworthiness, and hence the Circuit Court of Appeals might be justified in saying that the proof was insufficient to establish unseaworthiness. To illustrate the inquiry, one of the members of the Court suggested that, if a vessel should leave the port of New York in calm weather and later sink while she was being fired at by warships, then, notwithstanding the fact that there was no proof that any of the shots fired had struck the vessel, such evidence would be insufficient to permit a finding that the vessel was lost as a result of unseaworthiness. In reply to that suggestion, counsel for petitioner answered that this might be true under the particular facts stated by the inquirer, but that the situation thus stated is not analogous to that in the instant case.

The question assumed that it had been established by competent proof that the warships existed and were firing at the vessel. In the present case, on the contrary, the District Court found that the cause of loss alleged by the vessel owner, *i. e.*, negligence, or overloading, did not exist or was not established by competent or reliable proof. We submitted that the strongest case which could be made out for respondent here, is that there was a mere possibility (unsupported by any substantial evidence) that the sinking of the barge was due to negligence, *viz.*, overloading. We based this contention upon the finding of the District Court that the evidence was too speculative even to permit a finding that there had been overloading (Findings 32 and 33, R. 274, 275).

We do not overstate the case. In Finding 32 (R. 274) the District Court put the issue thus:

"The decision on the issue of whether or not the mate was negligent in loading the after cargo tanks of the barge, requires definite proof of the quantity of molasses in the various tanks when the mate was about to shut off the after tank valves and begin reloading the forward tanks."

In the next finding, *viz.*, Finding 33 (R. 275), the Court said:

"There is no way of determining what part of this total [the quantity of molasses which had been pumped from the ship to the barge] went into the forward tanks and what part into the after tanks."

The case is not one where there is a mere want of proof of causal connection between negligence and a subsequent loss. It involves the more fundamental question as to whether there was any negligence at all. On this fundamental question the District Court held that no such finding could be made because

respondent's evidence was such that it left the question of the mate's negligence to "speculation" (Finding 34, R. 275) and that respondent's experts presented estimates and conclusions to support its contention that the mate was negligent which "were not well founded and could not form a satisfactory basis" for reaching a conclusion on the issue of negligence (Finding 35, R. 275). In Finding 39 the District Court directed attention to the fact that figures produced by one of these experts were based upon "an arbitrary assumption" (R. 277). In Finding 40 (R. 277-8) the District Court found as a fact that two statements of the mate, upon which respondent must rely if it wished to succeed in establishing that the mate was negligent, were not "reliable", and in consequence the Court was "left to sheer guesswork in attempting to draw any conclusion from his testimony" (R. 278). In Finding 41 (R. 278) the District Court found that one of the experts called by the respondent made an "erroneous assumption" (R. 278); that because the other expert based his testimony on that "erroneous assumption," his figures "are valueless and we are left further in the dark on the issue of overloading" (R. 278).

It is clearly stated by the District Court:

"When a boat sinks in smooth water and without external contact of any kind there is a presumption of unseaworthiness. *The Emergency*, 9 F. Supp. 484; *The Jungshored*, 290 F. 733; *The Calvert*, 51 F. (2d) 494. Petitioner alleges that the sinking was caused by the negligence of the mate in overloading the after tanks of the barge. I do not find the evidence sufficient to establish this as a fact" (R. 253).

In Conclusion 1 (R. 280), the District Court found unseaworthiness, and based that finding upon sinking in calm weather without any external contact. Al-

though the District Court referred to this conclusion as having been arrived at by the application of a presumption, that reasoning does not alter the fact that it was a finding. This Court in *Pendleton v. Benner Line*, 246 U. S. 353, 354, treated similar evidence as proof of unseaworthiness, without any mention of a presumption.

To make the matter plain, in Conclusion 1 the District Court said: "I find that this loss resulted from unseaworthiness" (R. 280).

In view of these findings we submit that the Circuit Court of Appeals was wrong when it said:

"We do not understand that the judge in declaring that he could not decide whether the barge was seaworthy, did not consider her unexplained sinking as part of the evidence before him; but that, on the contrary, having weighed everything, including her sinking when she did, he was left in doubt. He then took recourse to the presumption which he supposed to persist as a determining legal factor. So far as we can see, that was the exact equivalent of putting the burden upon the Barge Company to prove that the barge was seaworthy" (R. 297).

The Circuit Court of Appeals overlooked the statement of the District Court that respondent's evidence was so unsubstantial as to prevent it from basing any finding upon it. The Court also overlooked the fact that the District Court had based its finding of unseaworthiness upon the adequate proof of sinking without any external contact (Conclusion 1, R. 280). Consequently, when the District Court said that "*the best that can be said of the state of the record is that the cause of the accident has been left in doubt*" (R. 258), it did not mean that the cause of the accident *had been* left in doubt. All that it did mean was that even if the evidence of respondent should be

treated as substantial, then the best that could be said for it was that it showed that the cause of the sinking had been left in doubt. There is nothing in the opinion which suggests that this statement of the District Court was intended to modify its detailed findings that respondent's evidence was in fact unsubstantial and unreliable.

What the District Court did is far from placing the burden upon respondent to prove its barge seaworthy. The sinking in calm waters without more "required the inference" of loss from unseaworthiness and a judgment for petitioner. *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 171. The introduction by the respondent of unsubstantial and unreliable evidence did not alter the situation. The proof of unseaworthiness remained in full force, and could not be disturbed until respondent offered evidence which warranted a finding to the contrary. That respondent never did.

In the light of what was stated by Mr. Justice Black in his dissenting opinion in *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, at page 176, it is not necessary to take "recourse to the presumption" "as a determining legal factor". The District Court had found upon adequate proof that the barge sank because she was unseaworthy. It had also found that respondent's evidence relative to overloading was unsubstantial. Hence, there was no evidence before the Court sufficient to overcome "the previous adequate proof" of unseaworthiness, and the District Court so found (Conclusion 1, R. 280). Therefore, the Appellate Court should not have substituted its opinion for that of the District Court as to the sufficiency of that evidence.

## POINT I.

When petitioner proved that the barge "T. N. No. 73" sank in smooth water without any external contact, it made out a *prima facie* case of unseaworthiness. Under the decisions of this Court in *Del Vecchio v. Bowers*, 296 U. S. 280, and *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, this proof required a judgment for the petitioner unless the respondent could show some cause of loss other than unseaworthiness.

There was sufficient evidence to establish a *prima facie* loss by unseaworthiness when it appeared that the barge sank in calm water, without external contact. *Pendleton v. Benner Line*, 246 U. S. 353, 354; *S. C. Loveland Co. v. Bethlehem Steel Co.* (C. C. A. 3), 33 F. (2d) 655, 657.

In *Del Vecchio v. Bowers*, 296 U. S. 280, this Court, in considering the issue as to whether a death had occurred from an accidental cause or from suicide, held that the presumption that the death was from an accidental cause remained until the employer had introduced evidence sufficient to justify a finding of suicide. Applying that test here, we submit that the *prima facie* case of unseaworthiness controlled the decision, because the District Court was unable, by reason of the insufficiency of the evidence introduced by respondent, to make any finding which would dislodge that *prima facie* case. The respondent in this case had merely introduced evidence which at best left in doubt the question as to whether or not there had been overloading (Conclusion 2, R. 280). It had failed to introduce any "evidence sufficient" to justify a finding of overloading (Finding 28, R. 273). It left the Court "in the dark on the issue of

overloading" (Finding 41, R. 278). In these circumstances, the finding that the sinking was caused by unseaworthiness was correct. To put the matter in the words of this Court in *Del Vecchio v. Bowers*, *supra*, the presumption remained in the case, for its "office is to control the result where there is an entire lack of competent evidence" to the contrary (296 U. S. at p. 286).

We have cited in our principal brief (Brief, pp. 14-15) many cases to show that proof of a sinking in calm weather without any external contact is sufficient to establish that a vessel sank because of unseaworthiness. Respondent in its brief realized that proof of sinking in calm weather, without any explanation, is sufficient to establish unseaworthiness, because at pages 3-6 of its brief there is an attempt to establish the explanation of overloading. The difficulty with this argument is that it asks this Court to make a finding that there was sufficient evidence to establish overloading when the District Court found that the evidence was insufficient to establish that fact. An Appellate Court, although an appeal in admiralty is treated as a trial *de novo*, will not disturb findings of a trial court except on the clearest evidence.\* This is especially true in this Court.

\* In *The Andrea F. Luckenbach*, 78 F. (2d) 827, 828, the Circuit Court of Appeals for the Ninth Circuit expressed the rule thus: "the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the Appellate Court unless clearly against the weight of the evidence." See also

*The Lake Galewood* (C. C. A. 1), 66 F. (2d) 83;  
*United States Gypsum Co. v. Connors Marine Co.*  
 (C. C. A. 2), 119 F. (2d) 689;  
*Doll v. Scott Paper Co.* (C. C. A. 3), 91 F. (2d) 860;  
*The Frances* (C. C. A. 4), 101 F. (2d) 30;  
*The William A. Paine* (C. C. A. 6), 39 F. (2d) 586;  
*The Eastland* (C. C. A. 7), 78 F. (2d) 984;  
*The Redwood* (C. C. A. 9), 81 F. (2d) 680;  
*Baton Rouge & B. S. Packet Co. v. George* (C. C. A. 5),  
 128 F. 914.

where, as is the case here, no application for certiorari has been made by a party which attacks the findings of a trial court. See *Oxford Paper Company v. The Nidarholm*, 282 U. S. 681, 684.\*

After deciding *Del Vecchio v. Bowers*, *supra*, this Court dealt with the same problem in *New York Life Insurance Co. v. Gamer*, 303 U. S. 161. That case involved a claim against the New York Life Insurance Company under a double indemnity feature of a policy of life insurance which excluded recovery in cases where death resulted from suicide. The deceased died by gun shot. The complaint in the suit alleged that the death of the insured resulted solely through external, violent and accidental means and did not result from self-destruction. The defendant's answer admitted that the plaintiff was entitled to recover the amount mentioned on the face of the policy; and the defendant deposited that sum in court. It denied, however, that death resulted from bodily injury effected through accidental means and that the plaintiff was entitled to a double indemnity.

This Court held that because the evidence was sufficient to sustain a finding that death was not due to accident, there was no foundation of fact for the

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\* But in the present case the evidence fully supports the District Court and is against respondent's contentions. The evidence is that there was water in the after peak tank (R. 115) where it was not supposed to be (R. 96), and there was no explanation of how it got there (R. 272). There was, however, proof from respondent's witnesses that the barge contained about 500 slack rivets (R. 118, 156, 158). Petitioner's witness said that there were some 1500 short rivets in the barge (R. 193-194). Thus there was in this case substantial evidence to support the finding of unseaworthiness and there was no evidence to the contrary of sufficient persuasiveness to support a finding that negligence or overloading existed. The evidence is more fully discussed at pages 3 to 8 of our reply brief.

application of the presumption; and that the case stood for decision by the jury upon the evidence, unaffected by the presumption that the death resulted from accidental cause. The Court said (p. 171):

“Upon the fact of violent death without more, the presumption, *i. e.*, the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. *Travellers’ Ins. Co. v. McConkey, supra*, 665. It was not submitted on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. *The evidence being sufficient to sustain a finding that the death was not due to accident*, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed” (303 U. S. at p. 171). (Italics ours.)

Applying this law to the present case, since respondent’s evidence was “not sufficient” (Conclusion 1, R. 280) to sustain a finding that the sinking was due to negligence or overloading, there was a “foundation of fact for the application of the presumption” which arose from the proven fact that the barge had sunk in smooth water without any external contact.

## POINT II.

**The Circuit Court of Appeals was in error when it held that the District Court was unable to conclude that the loss was caused by unseaworthiness and that it was in doubt as to the cause of loss.**

The Circuit Court of Appeals in referring to the decision of the District Court said:

"The finding that the 'cause of the accident has been left in doubt', means, we take it, that the evidence as to whether or not the barge sank because of unseaworthiness, was so evenly matched that the judge could come to no conclusion upon the issue" (R. 293).

We respectfully submit that in making this statement the Circuit Court of Appeals was clearly in error. What the District Court did decide was that there was a *prima facie* case made out by the petitioner when it appeared that the vessel sank in calm water without external contact (Conclusion 1, R. 280). Then it decided that the evidence offered by respondent was so unsubstantial that it would not support a contrary finding. Unsubstantial evidence does not match substantial evidence. Certainly under these circumstances it is error to say that the evidence was "evenly matched". Nor did the District Court so say. In Conclusion 2 (R. 280) it said:

"2. The fact that the best that can be said of the state of the record is that the cause of the accident has been left in doubt does not help the petitioner in these limitation proceedings, because from that doubt the law draws a presumption of unseaworthiness which deprives petitioner of the right to limit liability to the value of the barge and her freight then pending" (R. 280).

The language of this conclusion is lifted bodily from the opinion. A reference to the opinion, where the language can be read in its context, makes its meaning clear. This language follows a careful analysis of respondent's evidence relating to overloading. The Court states that this evidence was insufficient to permit a finding that the barge was overloaded and that the testimony of respondent's experts was based upon an erroneous assumption. The Court in its opinion goes on to say:

"If it is an erroneous assumption, and I think it is, then all of Capt. Haight's figures are valueless and we are left further in the dark on the issue of overloading" (R. 258).

It follows this sentence with the following paragraph:

"The best that can be said of the state of the record, is that the cause of the accident has been left in doubt. But this does not help the petitioner in these limitation proceedings—because from that doubt the law draws a presumption of unseaworthiness, which would deprive petitioner of the right to limit liability to the value of the barge and her freight then pending" (R. 258).

Reading this language in its context, it is apparent that, in the opinion of the District Court, the best that can be said for respondent's evidence is that it left *respondent's explanation* of the *sinking* in doubt. The Court then went on to say that this evidence, which did leave such doubt, did not help respondent. The District Court was quite right in making this statement, because the fact that the barge sank in calm weather, without external contact, "required the inference" of loss by unseaworthiness. This result is in accordance with *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 171, where this Court said:

"As the case stood on the pleadings, the law required judgment for plaintiff". And as this Court pointed out in that case, as well as in *Del Vecchio v. Bowers*, 296 U. S. 280, there must be evidence "sufficient to sustain a finding" that the loss was due to some other cause, in order to displace the inference or presumption. Mr. Justice Black in his dissenting opinion in *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 176, followed a different path, but in this case the result is the same no matter what path is followed. Because there was adequate proof of unseaworthiness when it appeared that the barge sank in quiet waters without any external contact, then it was for the trier of facts to decide whether the evidence offered by respondent was substantial enough to overcome "the previous adequate proof". Here when the respondent failed to produce any reliable evidence to establish overloading, substantial evidence was lacking. Indeed, the evidence was so unsubstantial that the District Court stated that he was "left to sheer guess work in attempting to draw any conclusions from his testimony" (R. 278).

Mr. Justice Frankfurter inquired as to what the District Court meant by the reference to limitation of liability in Conclusion 2 (R. 280).

It must be conceded that this reference to limitation of liability is not altogether clear. The obscurity may be due to the circumstance that the case was a limitation of liability proceeding and for that reason two issues were presented, which should have been kept separate, *viz.*, (1) the issue of liability, and (2) the issue of whether liability, if established, was a limited liability. In an earlier case Judge Hough differentiated between these issues in a limitation proceeding thus:

"The first duty of the court is to ascertain whether any liability exists, and if none exists

there is the end of the matter. But if liability be found, and loss or damage be shown, the second inquiry is whether such loss or damage was or was not 'done, occasioned or incurred without the privity or knowledge' of the shipowner petitioner" (*The Rambler*, 290 F. 791, 792 (C. C. A. 2)).

See also:

*The John H. Starin*, 191 F. 800, 801 (C. C. A. 2);

*The 84 H*, 296 F. 427, 431 (C. C. A. 2).

The burden of proof on the issue of limitation of liability was upon the respondent\*; and it may be possible that the District Court felt that when respondent had failed to establish its explanation of

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\* In *The Silver Palm*, 94 F. (2d) 776, 777, the Circuit Court of Appeals for the Ninth Circuit collected the authorities:

"Exoneration having been denied, the remaining issue is whether the Silver Line may limit its liability. The statute creating this right (46 U. S. C. A. §183) provides such relief only when the negligence causing the collision occurs without privity or knowledge on the part of the owner. The burden of proof of such absence of privity and knowledge is on the petitioning owner. *McGill v. Michigan S. S. Co.* (C. C. A. 9), 144 F. 788, certiorari denied 203 U. S. 593, 27 S. Ct. 782, 51 L. Ed. 332; *The Annie* (D. C.), 261 F. 797, 799, affirmed sub. nom. *People's Nav. Co. v. Torrey* (C. C. A. 4), 269 F. 793; *Henson v. Fidelity & Columbia Trust Co.* (C. C. A. 6), 68 F. (2d) 144, 145; *Petition of Diamond Coal & Coke Co.* (D. C.), 297 F. 242, affirmed (C. C. A. 3), 297 F. 246, and certiorari denied *Diamond Coal & Coke Co. v. Hazelwood Dock Co.*, 265 U. S. 595, 44 S. Ct., 638, 68 L. Ed. 1197; *In re Reichert Towing Line* (C. C. A. 2), 251 F. 214, 217, certiorari denied *Reichert Towing Line v. Home Ins. Co.*, 248 U. S. 565, 39 S. Ct. 9, 63 L. Ed. 424; *In re P. Sanford Ross* (C. C. A. 2), 294 F. 248, 257; *The 84-H* (C. C. A. 2), 296 F. 427, 432, certiorari denied *Randolph v. Bouker Co.*, 264 U. S. 596, 44 S. Ct. 454, 68 L. Ed. 867; *Christopher v. Grubby* (C. C. A. 1), 40 F. (2d) 8."

sinking, *viz.*, overloading, the issue had to be decided against respondent in any event "in these limitation proceedings", because of the burden resting upon respondent to establish its right to limitation.

Another explanation of the reasoning of the District Judge is found in the language of the very next paragraph of the opinion. It reads:

"On this question of limitation of liability, there is a further point to be considered" (R. 258).

The point referred to was that the contract of affreightment was a personal contract which under the decisions of this Court in *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, and *Pendleton v. Benner Line*, 246 U. S. 353, prevented the respondent from limiting liability (R. 258). To the cases cited by the District Court should be added the case of *Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82. The District Court's conclusion on this point is found in Conclusion 3 (R. 280).

It seems apparent that the District Court, having found in Conclusion 1 (R. 280) that the loss resulted from breach of the vessel owner's warranty of seaworthiness, then thought proper to say in Conclusion 2 (R. 280) that because of this fact the vessel owner was deprived of the right to limit liability since the contract which it had breached was its personal contract, under the principle of the decision of this Court in *Pendleton v. Benner Lines*, 246 U. S. 353, cited by the District Court with a statement of the principle in its Conclusion 3 (R. 280).

## POINT III.

**Mere contradictory evidence, insufficient to support a finding, was not sufficient to warrant the Circuit Court of Appeals in disregarding findings of the District Court that the loss was due to unseaworthiness. The District Court as the trier of facts—not the Appellate Court—should decide when there has been substantial evidence which overcame the previous adequate proof.**

To hold otherwise is in effect to overrule the decision of this Court in *Pendleton v. Benner Line*, 246 U. S. 353. There, speaking through Mr. Justice Holmes, this Court held that, in a case where cargo owner's only proof was a showing that a vessel sank without any external contact, the District Court, as a trier of facts, correctly found that a loss was caused by unseaworthiness, notwithstanding that the vessel owner offered testimony as to the good condition of the vessel on sailing, of bad weather, and that the vessel struck a floating object. The District Court held that the testimony as to good condition on sailing was not sufficient, in view of its finding that there was no bad weather, to overcome the *prima facie* case that the vessel sank because of unseaworthiness. The testimony as to the vessel striking a floating object was held to be unreliable, and, therefore, not sufficient to rebut the presumption of unseaworthiness. In the instant case, the District Court likewise found that the vessel owner's testimony as to the mate's negligence was unreliable, and that respondent's expert testimony as to alleged overloading based upon it was insufficient to cause the Court to modify its conclusion that the barge sank from unseaworthiness. If this Court had considered in *Pendleton v. Benner Line* that the mere offer of proof as to a possible contrary explanation was sufficient to prevent a finding by the

District Court that the vessel had sunk because of unseaworthiness, it would seem that the result reached in that case would have been otherwise from that actually arrived at.

In the dissenting opinion in *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 176, Mr. Justice Black' states that in cases such as that now before this Court, the issue whether or not evidence is substantial should be determined by a jury, the trier of the facts. The trier of the facts here, the District Court, held that respondent's proof was unsubstantial. Then, since proof of sinking without any external or violent cause has uniformly been held to establish loss by unseaworthiness,\* mere contradictory evidence, found by the trier of facts to be unsubstantial, was insufficient to overcome that original adequate proof.

"The *jury*—not the *judge*—should decide when there has been 'substantial' evidence which overcomes the previous adequate proof" (303 U. S. at p. 176). (Italics are Mr. Justice Black's.)

Here the District Court, which stood in the position of the jury,\*\* decided that there had not been any such substantial evidence (Conclusion 1, R. 280) which overcame the previous adequate proof of unseaworthiness, *viz.*, sinking in calm water, without external contact. Therefore, the Appellate Court should not have disturbed the finding of the District Court (the equivalent in Admiralty of the verdict of a jury). When the District Court made its decision, we submit

\* See cases cited in our principal brief, pages 14-15.

\*\* There are no juries in Admiralty. But see *Barlow v. Pan Atlantic, S. S. Corp.* (C. C. A. 2), 101 F. (2d) 697, 698, where the Court said:

"It is elementary that the weight of the evidence on an issue determined by the trial judge is not to be reviewed by an appellate court."

that the Appellate Court could not set it aside merely because the Trial Court had said that the best that can be said of the record, which consisted of the vessel owner's attempt to overcome the presumption of unseaworthiness, is "that the cause of the accident has been left in doubt" (R. 280). This statement indicated no doubt in the mind of the Court as to the cause of the loss, for the Court had already reached the conclusion that "this loss resulted from unseaworthiness" (Conclusion 1, R. 280). When the trier of the facts found that the evidence adduced by the respondent could do no more than leave the cause of the accident in doubt and resolved that doubt against respondent, because respondent's evidence left the matter to speculation (Finding 34, R. 275), and because respondent's evidence was "not well founded and could not form a satisfactory basis for determining" (Finding 35, R. 275), and because the testimony of respondent's leading fact witness was unreliable and a guess (Finding 40, R. 277), that finding of fact of the trial court should not have been disturbed by an Appellate Court.

Certainly a verdict reached on "previous adequate proof" that the boat was unseaworthy because she sank in calm water without any external contact, should not be set aside on any such unsubstantial evidence as this. No more should the finding of the District Court—the trier of the facts—be set aside. But that is exactly what the Circuit Court of Appeals did do, and it is that error which we have asked this Court to correct. Compare what was done in *Pendleton v. Benner Line*, 246 U. S. 353, 354, where, on reasoning almost identical with that of Mr. Justice Black in the dissenting opinion in *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, 176, this Court held a vessel unseaworthy, with what the Circuit Court of Appeals did in this case.

## POINT IV.

**The contract did not require the petitioner to insure against the respondent furnishing an unseaworthy vessel when respondent had expressly warranted that the vessel was seaworthy.**

In addition to the question of law as to the scope and effect of the presumption of seaworthiness, this case also presents for decision the question as to whether owners of goods are to be required to insure against a vessel owner's negligence in failing to provide a seaworthy ship (Petition for Certiorari, p. 10; Petitioner's Main Brief, pp. 40-53). On this point, in answer to a suggestion by Mr. Justice Black during the prior oral argument that *The Caledonia*,\* 157 U. S. 124, 132, established that the warranty of seaworthiness in a contract of carriage protected the cargo owner until the vessel breaks ground, counsel for respondent stated that this law did not apply in the present case because that was "old law".

In *The Toledo*, not yet officially reported but reported in 1941 A. M. C. 1219, the Circuit Court of Appeals for the Second Circuit discussed the rule of construction considered in *The Caledonia*, 157 U. S. 124, and in *The Carib Prince*, 170 U. S. 655, and said at page 1221:

"The principles of construction discussed in *Caledonia*, *supra*, would seem to be equally applicable when the warrantor is a private carrier."

The suggestion made during argument that the rule in *The Caledonia* was inapplicable here because the contract of carriage here involved related to private

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\* See our principal brief, pages 41-44.

carriage and not common carriage is, therefore, without merit. In *Cullen Fuel Co. v. Hedger Co.*, 290 U. S. 82, 88, this Court held a private carrier to full liability under a warranty of seaworthiness, notwithstanding the fact that the warranty was only implied—not expressed as it is here (Finding 42, R. 278)—for loss resulting from the *sgow* capsizing and dumping her load during loading.

We have shown in our principal and reply briefs\* that the contract of carriage did not in any event require that your petitioner supply respondent with any P. and I. (*i. e.*, liability) insurance, but required your petitioner to “insure the cargoes” carried, for the account of the respondent, only to the extent called for by the proper interpretation of the contract. In determining whether there was any intention to extend the obligation of providing insurance so as to cover unseaworthiness during loading, the whole agreement between petitioner and respondent contained in the contract of carriage must be considered—*Nelson Line, Ltd. v. James Nelson & Sons, Ltd.*, (1908) A. C. 16,—especially the context of the clause exempting the carrier from loss “in respect of which insurance has been or could have been effected”. We there showed that the provision relating to insurance, as was said in *The Nelson Line* case, was not sufficient to permit a shipowner to divest himself of the obligation to supply a seaworthy ship. That obligation “may be negatived only by express covenant”. *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U. S. 82, 88. See also *The Caledonia*, 157 U. S. 124, 137, and *The Carib Prince*, 170 U. S. 655, 659.

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\* See our principal brief, pages 45-52 and Reply Brief, pages 18-23.

A further discussion of that subject is unnecessary. The only "new" provision in the policies here involved reads:

"The seaworthiness of the vessel as between the assured and the underwriters is hereby admitted" (R. 238).

These words, however, do not assist respondent; for, as was said in *The Turret Crown*, 297 F. 766, 780 (C. C. A. 2), cert. den. 264 U. S. 591:

"The phrase 'as between the assured and the assurers' prevented the carrier from taking any benefit from the admission of seaworthiness. The words must be taken in their true meaning. The shipper and his underwriter are at liberty to exclude the carrier from any participation in the insurance. The underwriter may provide with the shipper that if the vessel is unseaworthy he will protect him, but not release the carrier. The British insurance is paid under the loan receipt, and there is no waiver of the underwriter's claim against the carrier" (297 Fed. at p. 780).

The policy here, as in *The Turret Crown*, *supra*, provided that the carrier should not be released from liability under its contract (R. 279), and the loss was settled as a loan (Finding 46, R. 280). The method of insurance here used was exactly like that in *The Turret Crown*, and there was not any indication in either the contract of affreightment or in the policy of insurance that the parties intended to insure the carrier against the unseaworthiness of its own vessel. There was nothing in this so-called new method of insuring which suggests that such insurance was in any way to be for the benefit of the shipowner. In fact, the express language of the parties is to the contrary. Nor is there anything in the language of the contract of carriage which suggests that the cargo

owner was obliged to insure against the carrier's failure to perform his personal warranty to supply a seaworthy ship.

As this Court pointed out in *Luckenbach v. McCahan Sugar Co.*, 248 U. S. 139, 149, it is desirable that shippers be reimbursed by their underwriters without awaiting the outcome of litigation against carriers and without waiving their right against such carriers.

### CONCLUSION.

**The decisions below should be reversed and a decree entered awarding the cargo owner its damages, with interest and costs.**

T. CATESBY JONES,  
LEONARD J. MATTESON,  
EZRA G. BENEDICT FOX,  
*Counsel for Petitioner.*



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CHARLES ELMORE COOPLY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1940.

No. 584.

OCTOBER TERM, 1941.

No. 14.

COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

—against—

NEW YORK TANK BARGE CORPORATION, as Chartered  
Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**REPLY TO SUPPLEMENTAL BRIEF OF  
RESPONDENT ON REHEARING.**

T. CATESBY JONES,  
LEONARD J. MATTESON,  
EZRA G. BENEDICT FOX,  
*Counsel for Petitioner.*

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**REPLY TO SUPPLEMENTAL BRIEF OF  
RESPONDENT ON REHEARING.**

Notwithstanding this is an action on a contract entered into in this country, and to be performed here, and is therefore clearly governed by the several decisions of this Court cited in our earlier briefs, the respondent, in its supplemental brief just filed, resorts to, and puts its principal emphasis on, a decision of an English Court based on very different facts, viz., *Imperial Smelting Corporation, Ltd. v. Constantine S. S. Line, Ltd.*, 46 Commercial Cases 258, 70 Lloyd's List Reports, 1 (H. of L.). That case involved the failure

of a shipowner to deliver a ship to a charterer to load cargo pursuant to a contract of charter party. Suit was brought by the charterer against the shipowner for breach of "the charter party by failing to load a cargo" (46 Com. Cas. at p. 259). The shipowner admitted that it was in default as alleged but set up as a defense frustration, or supervening impossibility of performance, and *proved* that an explosion had occurred which caused the sinking and destruction of the vessel before delivery was due under the contract.

The question presented in the case was thus stated:

"The question here is how the onus of proof lies; that is, whether, when a supervening event has been proved which would, apart from the defendant's 'default' put an end to the contract, and when at the end of the case no inference of default exists and the evidence is equally consistent with either view, the defense fails because the defendant has not established affirmatively that the supervening event was not due to his default" (46 Com. Cas. at p. 262).

This passage clearly shows the difference between the question under discussion by the House of Lords in the *Imperial Smelting Company* case and the question involved here. Here no "supervening event has been proved" by respondent, hence the *prima facie* case made out by the sinking of the barge in calm water, without external contact, explosion, or other explanation, remains undisturbed. In the *Imperial Smelting Company* case, the shipowner established as a fact that the cause of the sinking of the vessel there involved was an explosion. In the present case the respondent shipowner has failed to establish any fact

or event (other than unseaworthiness) which might be the cause of the sinking of its barge. It introduced evidence to show that overloading was the cause, but, as we have shown at page 16 of our reply brief, overloading itself constitutes unseaworthiness, and the District Court has found expressly that respondent's evidence as to the event (alleged overloading due to supposed negligence of the mate) which the respondent contended to be the cause, was not only insufficient to establish that cause, but was also insufficient to establish that there was overloading or that the mate was negligent. The finding of the District Court (Conclusion 1, R. 280) was that the tank barge sank at her dock in New York Harbor, in calm water, without explanation of any kind and without any external contact. This was adequate proof, under well settled law (see our Main Brief, pp. 12-15), to establish that the vessel sank from unseaworthiness. The respondent shipowner has wholly failed to show that the vessel suffered from any explosion or encountered any peril, or any external contact which might have been a possible cause for the sinking. If in the *Imperial Smelting Company* case the shipowner had been unable to establish the fact of an explosion, or to produce any substantial evidence to show why he failed to load the charterer's cargo, the judgments filed in that case show that the decision would have been the other way. Therefore, the case, if it be regarded as in any way applicable, is authority for petitioner rather than for respondent.

Respondent evidently realizes that this is so because, at page 4 of its Supplemental Brief, it challenges the long-settled doctrine that the sinking of a vessel in calm water, without explanation, makes out a *prima facie* case of loss from unseaworthiness. In none of the cases cited at page 4 of the Respondent's Supple-

mental Brief did the vessel involved sink in calm water, without any external contact. All of the cases cited by respondent deal with either (1) a situation where nothing is known concerning a vessel after she has sailed in a seaworthy condition, except that she has never been heard from after sailing, or (2) a situation where a vessel has been lost in a war zone, known to be infested with submarines, or in a known mine field. None of them deal with a case similar to that at bar, where the circumstance is known that the vessel has sunk at her dock in a harbor, in calm water, and where it is known that there was no external contact of any kind to account for the sinking.

The difficulty with the principle stated by respondent at page 5 of its brief, is that the respondent neglects to say that sinking of a vessel in calm weather, in a harbor, without any explanation, or proof of any external contact, constitutes adequate proof of unseaworthiness; and also that respondent neglects to say that the mere offering by a shipowner of testimony, which a Court finds to be unreliable, speculative and unsubstantial, is insufficient to overcome the previous adequate proof of unseaworthiness. To overcome such proof, it is necessary to offer substantial evidence (303 U. S. at p. 176).

In *Ajam Goolam Hossen & Co. v. Union Marine Insurance Co.* [1901], A. C. 362, referred to in the passage quoted from Lord Wright at page 3 of respondent's supplemental brief, the House of Lords recognized that where a vessel sinks without encountering any storm, or other known cause sufficient to account for the catastrophe, a case of unseaworthiness is made out. There Lord Lindley said:

"The underwriters have the great advantage of the undoubted fact that the vessel capsized and

sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe; and there is no doubt that if nothing more were known, they would be entitled to succeed in the action. If nothing more were known, unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a Court ought to act upon if unassisted by a jury" ([1901] A. C. 363, at p. 366).

In the *Ajum Goolam Hossen* case, however, it was definitely proved that that vessel had been carefully examined by both public officials and by the master, and she had been found to be in all respects seaworthy at the time of sailing. It was further proved by the shipowner that after the vessel sailed, and during "a fresh breeze and a confused sea" ([1901] A. C. at p. 368) the vessel acquired a list; that at 9:30 P. M. the captain went to bed; that the "great increase of the list \* \* \* took place after 10:30 P. M."; that, if this list "had been reported to the captain" it could "have been remedied", but that at the time that it was reported to the captain, viz., shortly after 4 A. M., "it was too late to right the ship" ([1901] A. C. 369). In support of its judgment the Court cited *Steel v. State Line Steamship Co.*, 3 App. Cas. 72, as holding "that a ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board" ([1901] A. C. at p. 371). Thus there was definite proof that after sailing there was an act of mismanagement of the ship by the officer on watch which was sufficient to account for the sinking. In the present case all attempts of

the respondent to establish any act of mismanagement failed. The District Court expressly rejected the respondent's evidence as to supposed mismanagement, and held that the respondent's testimony was too speculative, unsubstantial and unreliable to permit him to make any finding that mismanagement existed or that it could have caused the sinking.

It is noteworthy that this Court in *The Silvia*, 171 U. S. 462, at 465, cited *Steel v. State Line Steamship Co.*, 3 App. Cas. 72 with approval. In *The Sacia* this Court held that where the port holes on a steamer had shutters which "would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing" (171 U. S. at p. 465) if the ship has sailed with the shutters open. The reason for the rule is that such condition could be easily remedied by the crew at sea after sailing. The *Ajam Goolam Hossen* case merely decided the same point. In the present case, however, respondent's efforts to establish similar facts completely failed.

*in the Imperial Smelting case*

Lord Russell expressed the same thought in the following language:

"Whether the doctrine is applicable in favour of a contractor who is sued on the contract will depend in each case on the ultimate result of the whole evidence, the position of the parties as regards burden of proof varying from time to time as indicated by Bowen L. J. in *Abrath v. North Eastern Railway Company* [1183—11 Q. B. D. 440] (at p. 456). The defendant will prove the destruction of the *corpus*, and (where possible)

the event which brought it about. *It may be that the event is of such a nature as of itself to raise a prima facie case of fault or default in the defendant. Unless he displaces that prima facie case, he will be unable to rely on the doctrine.* The frustration will stand as self-induced. On the other hand it may be that nothing is known as to what event brought about the destruction or the known event may be of such a nature as of itself to raise no *prima facie* case of fault or default in the defendant. If the matter rests there he will be excused from liability under the contract." (46 Com. Cas. at p. 277—Italics ours.)

Similarly, Lord Wright in his judgment in the *Imperial Smelting Company* case said:

"In the same way, if negligence is alleged to override the defence of excepted perils, it must be alleged and proved affirmatively." (46 Com. Cas. at p. 289.)

The District Court has found that the respondent has wholly failed to establish that any negligence (*i. e.*, mismanagement) has been established which would over-ride the *prima facie* case of unseaworthiness. Hence, in the present case the respondent has not displaced petitioner's *prima facie* case.

In *Pendleton v. Beacon Line*, 246 U. S. 353, at page 354, fully discussed in our principal brief, at pages 17 and 18, this Court clearly approved the statement of the Circuit Court of Appeals that the sinking of a vessel during weather insufficient to affect a seaworthy ship, is adequate proof that the sinking resulted from unseaworthiness. In *The Jungshoved*, 290 F. 733, certiorari denied, 263 U. S. 707, the Cir-

cuit Court of Appeals for the Second Circuit, Judge Hough, stated the doctrine as follows:

"It follows that the fact stands uncontradicted that the 'Crown' was tendered as suitable to carry the load for which her size fitted her, and under less than that load, in smooth water and calm weather, she sank; in the picturesque phrase of the water front, 'she just faded away' without explanation, then or since. This raises a presumption of unseaworthiness (*Dupont v. Vance*, 19 How. 162\*, 15 L. Ed. 584; *The Kathryn B. Guinan*, 176 Fed. 301, 99 C. C. A. 639), which, though rebuttable, has not been met. Therefore the lighter and her owner are liable and may be held for damages if properly sued" (290 F. 734, 735).

We know of no case where the rule as stated in *Pendleton v. Benner Line* and in *The Jungshoved* has not been applied on facts such as those here, and it is significant that respondent is unable to cite any such case. Since the sinking was of such a nature as of itself to raise a *prima facie* case of loss from unseaworthiness, and since the respondent has been unable to displace that *prima facie* case by showing any event or peril, such as explosion, external contact, or other overwhelming force, the case should be decided on that *prima facie* case. That is the doctrine of this Court in *Del Vecchio v. Bowers*, 296

\* The circumstance that the citation of *Dupont v. Vance*, 19 How. 162, by Judge Hough in *The Jungshoved*, is a mistake and should have been *Work v. Leathers*, 97 U. S. 379, is unimportant. Judge Learned Hand says in the present case (R. 295) that the mistake arose because of misplaced quotation marks in *Oregon Round Lumber Co. v. Portland, dv. S. S. Co.*, 162 Fed. 912, 921. This is quite true, but we submit that the mistake is unimportant. It merely requires us to look to *Work v. Leathers* for authority rather than to *Dupont v. Vance*.

U. S. 280 and in *New York Life Insurance Co. v. Gamer*, 303 U. S. 161, especially where the trier of the facts has found that the respondent's evidence offered to displace the *prima facie* case, is unsubstantial and insufficient to support a finding in its favor.

This is a very simple case. The essential facts are settled by the District Court's findings. A steel vessel sank while alongside a dock in New York Harbor during calm weather and sea conditions and without external contact with any vessel or object, and without any explanation whatever excepting unseaworthiness or inability to keep water out of her. The respondent shipowner endeavored to show that the mate had negligently overloaded the vessel and caused her to sink, but the District Court rejected this evidence entirely on the ground that it was too unsubstantial to show either that the mate had been negligent, or that the vessel had been overloaded, or that the overloading suggested caused the vessel to sink (Finding 28, R. 273). The vessel on being raised was found to have a very large number of defective and leaky rivets throughout the vessel (R., p. 118) (according to petitioner 1500—R., p. 193, and admittedly according to respondent 500—R., p. 118), and the afterpeak tank, which had been empty (R. 62), and which had water-tight hatch covers secured in place at all times (R. 272 and 64), was found, on the vessel being raised, to be half full of sea water (R. 115).

Respectfully submitted,

T. CATESBY JONES,  
LEONARD J. MATTESON,  
EZRA G. BENEDICT FOX,  
*Counsel for Petitioner.*



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IN THE  
Supreme Court of the United States

No. 584—OCTOBER TERM, 1940.

14

IN THE MATTER

of

The Petition of NEW YORK TANK BARGE CORPORATION,  
as chartered owner of the tank barge *T. N. No. 73*,  
for exoneration from or limitation of liability.

COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*  
(*Claimant below*)

vs.

NEW YORK TANK BARGE CORPORATION, as chartered  
owner of the tank barge *T. N. No. 73*,

*Respondent,*  
(*Petitioner below*).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF FOR NEW YORK TANK BARGE  
CORPORATION IN OPPOSITION.

---

ROBERT S. ERSKINE,  
*Counsel for Respondent*



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IN THE  
Supreme Court of the United States

No. 584, OCTOBER TERM, 1940.

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IN THE MATTER

*of*

The Petition of NEW YORK TANK BARGE CORPORATION, as  
chartered owner of the tank barge *T. N. No. 73*, for  
exoneration from or limitation of liability.

---

COMMERCIAL MOLASSES CORPORATION,

Petitioner,  
(Claimant below),

vs.

NEW YORK TANK BARGE CORPORATION, as chartered  
owner of the tank barge *T. N. No. 73*,

Respondent,  
(Petitioner below).

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

---

BRIEF FOR NEW YORK TANK BARGE  
CORPORATION IN OPPOSITION

OPINIONS BELOW.

The opinion of the District Court is not officially reported but is unofficially reported at 1939 A. M. C. 673, and is printed in the Record (R. 281). The opinion of the

Circuit Court of Appeals is officially reported at 114 F. (2d) 248, and is printed in the Record (R. 339).

#### JURISDICTION.

This is a proceeding in admiralty instituted by New York Tank Barge Corporation, as chartered owner of the tank barge *No. 73* (the petitioner in the District Court), for exoneration from or statutory limitation of liability for damages resulting from the sinking of the barge at Pier 1, Hoboken, New Jersey, on October 24th, 1937. The petitioner in this Court was the sole claimant below with respect to loss or damage of the barge's load of molasses, and is invoking the jurisdiction of this Court under Section 240 of the Judicial Code as amended by the Act of February 13th, 1925, 43 Stat. 938, 28 U. S. C. §347.

#### THE FACTS.

The petition and petitioner's brief herein do not contain an adequate statement of the facts to indicate the basis of the decisions below, and thereby fail to show the very simple question which is actually involved.

This is not a "common carrier" case. The steel tank barge *T. N. No. 73* was furnished by respondent\* under a "private" contract of carriage (Ex. 6; R. 261), for harbor transportation of petitioner's molasses from alongside the *S.S. Athelsultan* at Pier 1, Hoboken, N. J., to destination at Baldwin Avenue, Weehawken, N. J. (R. 308).

Extended and uncontradicted testimony was offered and accepted by the trial judge that the barge was of the proper type and construction for the cargo; that she had been maintained in good condition by periodic drydockings and

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\* The parties are referred to by their titles in this Court.

repairs; that her proper maintenance was constantly supervised by experienced employees of respondent; that she had been drydocked and all necessary repairs had been made in May, 1937; that under ordinary circumstances no further drydocking was required in the interval of time to the date of the sinking; that the barge had carried a cargo of molasses a few days prior to October 23rd, 1937 without mishap, and that nothing had occurred in the interval to damage her; that when she went alongside the *Athelsultan* and before receiving any molasses she was inspected not only by respondent's assistant superintendent, but also by a representative of cargo interests, and was found to be clean, fit, and tight, with no leaks, cargo's representative admitting that the tanks "were dry and clean" (Fdgs. 10, 26; R. 308, 314; R. 37, 39, 65, 71, 174-176, 192, 197, 198, 228).

The barge commenced to receive the molasses at 9:05 P.M. on October 23rd, 1937, by means of the *Athelsultan's* pump and discharge hose (Fdg. 11; R. 308, 309). A competent and experienced master and mate were in charge of the barge, and after loading commenced the captain retired to his cabin, leaving the operations in charge of the mate (Fdgs. 12, 13; R. 309, 310).

With a heavy type of fluid cargo like molasses, a full load would be less than the cubic capacity of the barge's tanks (R. 100), and, without controversy, it is customary to judge a barge's full load (weight), by the final freeboard or height of the deck above the water (R. 37, 57; Fdg. 12, R. 309).

On this occasion, in accordance with the customary practice, the molasses was first taken into the barge's two forward tanks until the bow end of the barge was down to a freeboard of twenty-three inches, and then the forward valves were closed and the flow of molasses was started into

the two stern tanks (Fdgs. 12, 13, R. 309, 310). Under any combination of figures in the case, including those found by the trial judge (Fdg. 33, R. 317), the flow-of molasses into the stern tanks was at a rate of from three to three and a half tons per minute, which, according to uncontradicted expert testimony, was causing a steady settling of the barge by the stern at a rate of nearly one inch per minute (R. 163).

When the mate observed that the stern of the barge was down to about three inches of the proper freeboard, he started forward to close the stern valves, but stopped on his way for a conversation with someone on the deck of the ship, and thereafter, as he continued towards the stern valves, he felt the barge settle by the stern. By the time he could call the captain from the cabin the stern deck was under water. During all that time the molasses was still flowing into the stern tanks, and before the stern valves could be closed the barge parted her stern mooring lines and sank by the stern. Subsequently she parted the forward mooring lines and went completely to the bottom (Fdgs. 15, 16, 18, 19; R. 310-312).

The diver who subsequently took part in the raising of the barge found no evidence of leakage when he examined the barge (Fdgs. 21, R. 312, 313).

After the barge had been raised and put on drydock, respondent's port superintendent and five experienced surveyors, including a representative of your petitioner's underwriters, examined the hull for the purpose of ascertaining the cause of the sinking, but were unable to determine it because they were unable to find any evidence of unseaworthiness or leakage to account for the sinking (Fdg. 23, R. 313; R. 81, 134, 138, 176, 226). The sides, ends, and bottom of the hull were tight, with the exception of

damage to bilge plates, which was obviously and admittedly due to the wire slings used in raising the barge after the accident (R. 81, 131-133, 137, 141, 226). That bilge-keel damage was in an area which would have been under water even when the barge was riding light, and was in the way of the cargo tanks, so that, as the barge had only a single "skin", if the damage had existed before loading there would have been a direct flow of water into the cargo tanks, which was negatived by the inspection of cargo's representative before loading commenced (R. 133, 141, 197, 210).

An experienced marine architect, having the dimensions of the barge and her tanks, was able to calculate her buoyancy and to show that the weight of molasses pumped into the stern tanks was from twenty-one to eighty-four tons in excess of the sinking point (R. 164-167; Ex. 9, R. 267), those figures representing the difference between the computations worked out by the expert on information available before trial and the corrected computations made by him after the trial on the figures furnished to him by the trial judge (R. 279-280).

The private contract between the parties for the carriage of the molasses (Ex. 6, R. 261) contained the following clause:

"It is agreed that the \* \* \* Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co., Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc., and/or the owners of such barges; and that neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected" (R. 263).\*

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\* The trade name of your respondent, inadvertently used in the pleadings, was corrected at the trial to the proper corporate title, without objection (R. 31).

Your petitioner admitted by stipulation that it did not insure its cargo for the account of respondent and respondent's barge, but did insure for its own account, collected the insurance, and filed its claim in these proceedings on behalf of its underwriters (R. 182-185). Your petitioner did not offer any evidence that it could not have obtained insurance for account of your respondent and respondent's barge with respect to this loss.

#### THE PROCEEDINGS BELOW.

In the District Court your respondent, as owner of the barge, did not deny negligence of its employees in the loading of the barge's stern tanks, but prayed for statutory limitation of liability on the ground that it had no privity or knowledge of the said negligence (R. 5, 6);\* and at the opening of the trial, by an amendment made on due notice, asked that your petitioner's claim be dismissed because of your petitioner's failure to procure the agreed insurance, in breach of the provisions of the private contract of carriage quoted above (R. 31, 32)

Your petitioner alleged that the sinking of the *T. N. 73* was due to unseaworthiness (R. 11, 19, 344); and with respect to the contract, its contention is that its agreement

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\* The pertinent portions of R. S. 4283 are: "The liability of the owner of any vessel, whether American or foreign, \* \* \* for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, \* \* \* exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

This Statute, like the Fire Statute (R. S. 4282), does not require the owner of a vessel to prove seaworthiness as a condition precedent. *Earle & Stoddard v. Wilson Line*, 287 U. S. 420, 425, 426; *The El Sol*, 72 F. (2d) 212; *The No. 84-H*, 296 Fed. 427; *The Rambler*, 290 Fed. 791, 792.

to procure insurance was not intended to apply to a loss resulting from unseaworthiness, although it admits that for any other cause of loss its breach of the contract would bar the claim. Your petitioner throughout the proceedings has attempted to obscure the plain proposition that it had the burden of proving the unseaworthiness on which it sought to excuse its breach of the contract.

At the trial, the petitioner did not offer a scintilla of evidence to support its allegation of unseaworthiness, but rested its contention on an inference which it sought to draw from the mere fact of the sinking.

After careful consideration of the record, the trial judge found that "the best that can be said of the state of the record is that the cause of the accident has been left in doubt" (R. 295; Con. 2, R. 324). It is plain from his opinion, which has been incorporated in the findings and conclusions, that he meant that he was unable to determine whether the barge sank from unseaworthiness, or from negligence in the loading of the stern tanks. In spite of that recognition of another known possible cause of the sinking, he concluded that he was bound to infer unseaworthiness (Con. 2, R. 324).\*

The trial judge, however, concluded that the plain meaning of the insurance provisions of the contract included a loss due to unseaworthiness, and accordingly dismissed your petitioner's claim for its admitted breach of the contract, pointing out that the said contractual provisions were

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\* The trial judge apparently felt that he could not accept the proofs that the sinking was due to negligence in the loading of the stern tanks because of his inability to make the figures tally with arithmetical precision (Fds. 31-41, R. 316-321),—a test which would seem to go beyond all reasonable limits of proof in a case of this type in which arithmetical precision is always an impossibility.

not contrary to public policy in a contract of private carriage (R. 325-329).\*

The Circuit Court of Appeals did not decide in favor of your petitioner's appeal from the Bench, as now seems to be suggested (Petition, p. 5), but found it unnecessary to consider the argumentative excuse of the breach because your petitioner had not sustained its burden of proving the unseaworthiness on which the excuse was based. The decree dismissing your petitioner's claim was accordingly affirmed (R. 339-435).

#### THE QUESTION PRESENTED.

Thus, your petitioner's case involves solely the dismissal of its claim because of its breach of the contract by its admitted and unexplained failure to procure the promised insurance, and does not present the questions relating to a carrier's liability which your petitioner suggests.

The decisions of the lower courts on the question of your petitioner's breach of contract do not conflict with but are supported by established law. Your petitioner has cited only cases in which carriers, particularly common carriers, sought immunity from liability under the Harter Act or under bill of lading exceptions, where the carrier had the burden of proving seaworthiness as a condition precedent to the relief sought. The law of those cases with respect to a carrier's liability has no application to the question of your petitioner's breach of the private contract of carriage by its failure to procure insurance as agreed.

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\* The trial judge denied your respondent's prayer for limitation of liability under the law peculiar to "personal" contracts (Con. 3, R. 324). In this brief, the limitation of liability question is not discussed, because it was not involved in the dismissal of your petitioner's claim and is not the issue now raised by your petitioner.

## FIRST POINT.

YOUR PETITIONER'S CASE DOES NOT PRESENT THE QUESTIONS SUGGESTED BY IT.

The basic question is whether your petitioner can escape its admitted and unexplained breach of its contractual agreement to procure insurance for the account of your respondent and to release your respondent in the event of such a breach.

The trial judge rightly held that under the plain language of the contract (quoted, p. 5, *supra*), your petitioner's agreement to procure the insurance applied whether the loss was due to unseaworthiness or not (R. 325-329). The Circuit Court of Appeals did not indicate its disapproval of that decision (R. 345).

The said ruling is in accordance with the established law that a private carrier has complete freedom of contract, and may contract even against all liability. *Santa Fe v. Grant*, 228 U. S. 177, 185, 188; *The Sabine Sun*, 287 U. S. 291; *The Oceanica*, 170 Fed. 893; *The G. R. Crowe*, 294 Fed. 506, cert. denied, 264 U. S. 586; *Societa v. Federal Insurance Co.*, 62 F. (2d) 769; *New Haven Trap Rock Co. v. United States*, 15 F. Supp. 619, 620.

Under the language of the contract, your petitioner's agreement to procure the insurance was not limited to losses due to negligence other than unseaworthiness, but specifically related to "any loss" (R. 263). It was not an agreement to give to your respondent the "benefit" of your petitioner's insurance. It was a plain and affirmative undertaking by the petitioner to procure insurance for your respondent's account.

In holding that your petitioner's agreement related to loss due to "any cause", the decision of the trial judge in no way nullified the warranty of seaworthiness. If your petitioner had proven that the loss was due to unseaworthiness, and that it could not obtain the promised insurance for such loss, the warranty of seaworthiness would have remained in full force and effect. The suggestions in your petitioner's brief that it could not have obtained the insurance are wholly improper, in the absence of any proofs of an attempt to obtain it, or that it could not be obtained. Thus, the basic question decided in the District Court does not involve unseaworthiness and does not relate to a carrier's liability.

In an effort to escape from its breach of the contract as decided in the trial court, your petitioner argues, contrary to the plain language of the contract, that its agreement to procure insurance was not intended to cover losses due to unseaworthiness. Even if that argument were sound, (which your respondent denies,) your petitioner had to prove the alleged unseaworthiness.

It would seem almost elementary that a party who seeks to excuse his admitted non-performance of one of the terms of his contract has the burden of proving the facts on which he bases the excuse. *United Const. Co. v. Haverhill*, 22 F. (2d) 256, 259.

Moreover, a private carrier has not the responsibilities of a common carrier, but is liable, as a bailee, only for negligence; and the burden of proof remains on the bailor when all the evidence is in. *Southern Ry. v. Prescott*, 240 U. S. 632, 640; *The Lyra*, 255 Fed. 667; *Kohlsaat v. Parkersburg*, 266 Fed. 283; *Alpine Forwarding Co. v. Pennsylvania R. R. Co.* 60 F. (2d) 734; *The Norden*, 6 F. (2d) 883, 886; *The C. R. Sheffer*, 249 Fed. 600; *The Rokeby*, 202 Fed. 322.

For those reasons, your petitioner had the burden of proving the alleged unseaworthiness, and failed in that burden when the trial judge concluded that the cause of the sinking had been left in doubt.

That that was the view of the Circuit Court of Appeals seems clear from the following language:

"In the case at bar, the Barge Company was acting as a private carrier and was therefore only a bailee; it is well settled that the burden rests upon the bailor to prove some breach of duty by the bailee other than his mere failure to return. \* \* \* The Molasses Company acknowledged this by alleging in its claim that the barge was unseaworthy; it was obliged to do so; and, having done so, it had to persuade the judge or fail.

\*     \*     \*     \*     \*

"Since therefore we think that the claimant did not prove its case, even if the clause in the charter regarding insurance did not cancel the warranty of seaworthiness, it is not necessary to pass upon that question" (R. 344-345).

In an indirect way, in finding that your petitioner had not sustained its burden of proving unseaworthiness, the Circuit Court of Appeals recognized the oft-stated principle of law that an inference of unseaworthiness stands only so long as no other known possible cause of the loss is disclosed by the proofs. *The Transit*, 250 Fed. 71, 72; *The City of Camden*, 292 Fed. 93, 96; *In re Eastern Transp. Co.*, 37 F. (2d) 355, 358; *Pacific Coast SS Co. v. Bancroft-Whitney*, 94 Fed. 180, 196; *Sanbern v. Wright and Cobb*, 171 Fed. 449, 453.

That rule is well illustrated by two decisions in the Third Circuit, *The Transit*, 250 Fed. 71, 72, and *Loveland v.*

*Bethlehem Steel Co.*, 33 F. (2d) 655, which, when read together, show that on a factual basis the decision of the Circuit Court of Appeals herein is not in conflict with the rule in the Third Circuit as petitioner seeks to argue (Petitioner's brief, p. 18).

Your petitioner has not cited any case in conflict with the decisions below with respect to the question which the lower courts decided herein in dismissing your petitioner's claim.

The petition and petitioner's brief cite and make lengthy quotations from earlier cases in which carriers, particularly common carriers, were attempting to escape liability under the Harter Act, or under bill of lading exceptions. In such cases the carrier had the burden of proving seaworthiness as a condition precedent to the relief sought. The Circuit Court of Appeals commented on that distinction in its opinion herein (R. 344-345). But the law of those cases as cited by your petitioner does not apply here, for the simple reason that the same issues are not involved. The dismissal of your petitioner's claim in no way involves a carrier's liability, but turns solely upon your petitioner's breach of its undertaking in the private contract of carriage.

## SECOND POINT.

THE CASE HAS NONE OF THE IMPORTANCE WHICH YOUR PETITIONER SUGGESTS.

For the reasons stated above, the decisions of the lower courts are not in conflict with earlier decisions.

The case is also not of any peculiar importance to business interests of the maritime world, because it turns on

the specific provisions of a private contract of carriage. The parties themselves are fully able to correct the situation, if it needs any correction, in the drawing of future contracts.

### CONCLUSION.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

ROBERT S. ERSKINE,  
Counsel for Respondent.

Dated New York: December 5th, 1940.



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# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 584.

14

COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

vs.

NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BRIEF FOR RESPONDENT.

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ROBERT S. ERSKINE,

CLYDE S. KEATING,

L. DE GROVE POTTER,

RICHARD SULLIVAN,

*Counsel for Respondent*



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# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 584.

COMMERCIAL MOLASSES CORPORATION,  
Petitioner,

*against*

NEW YORK TANK BARGE CORPORATION,  
as chartered owner of the Tank  
Barge "T. N. No. 73",  
Respondent.

On Certiorari to the  
United States Circuit  
Court of Appeals for  
the Second Circuit.

## BRIEF FOR RESPONDENT.

### I. *Jurisdiction.*

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, filed pursuant to the provisions of the United States Code, Title 28, Section 347(a), on November 20th, 1940, and granted on December 16th, 1940.

### II. *Opinions.*

The writ seeks to review a decree of the Circuit Court of Appeals for the Second Circuit (R. 298), which affirmed a decree dismissing petitioner's claim entered May 22nd, 1939 in the United States District Court for the Southern District of New York (R. 264).

The opinion of the District Court by Judge Leibell is not officially reported, but is unofficially reported as *T. N.*

No. 73, 1939 A. M. C. 673, and appears at pages 246-264 of the Record.

The opinion of the Circuit Court of Appeals is reported as *Commercial Molasses Corporation v. New York Tank Barge Corporation*, 114 F. (2d) 248, and appears at pages 291-297 of the Record.

### III. *Statement of Facts.*

Respondent was the time-chartered owner of the steel tank barge *T. N. No. 73*, an oblong type of craft commonly used for harbor transportation of liquid cargoes in bulk, her interior being divided by thwartship and fore-and-aft bulkheads into two forward and two stern tanks (R. 25, 26, 29, 202, 212, 267).

Under a private contract of carriage, respondent furnished the barge to the petitioner to receive a load of molasses out of the Steamship *Athelsultan* at Pier 1, Hoboken, and transport it to petitioner's plant at Baldwin Avenue, Weehawken, New Jersey (Ex. 6, R. 230-233). The barge commenced to receive the molasses from the *Athelsultan* at about 9:05 P. M. October 23rd, 1937, and at about 1:05 A. M. on October 24th the barge sank by the stern (R. 268-270). At the time of the sinking, and previously thereto, molasses was being pumped by the *Athelsultan* into the barge's stern tanks at a rate of from three to three and a half tons per minute, thereby steadily deepening the barge by the stern at a rate of approximately one inch per minute (R. 150, 269-270, 274). That external force or influence on the trim and stability of the barge was continuing in effect when the stern went under, the *Athelsultan's* pump being stopped only after the accident had occurred (R. 269-270).

The private contract of carriage had been made by the respondent in 1928, with the predecessor company of the petitioner, Dunbar Molasses Corporation (Ex. 6, R. 230-233), and petitioner admittedly continued the contract upon taking over its predecessor's business, and the services of the *T. N. No. 73* were being furnished under that contract when this accident happened (R. 162; Petitioner's Brief, p. 3). The clause of the contract which is most directly involved in the present litigation is:

"It is agreed that the Dunbar Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co. Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc., and/or the owners of such barges; and that neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected" (R. 232).\*

Admittedly the petitioner did not take out any insurance on this cargo of molasses for the account of the respondent or the barge (R. 162). There was insurance on the molasses for petitioner's account; and petitioner, having collected its own insurance, is now, admittedly, prosecuting this suit on behalf of its underwriters (R. 162-163). No evidence was offered by petitioner to show that insurance, including coverage of losses due to unseaworthiness, could not have been obtained for respondent's account upon payment of the necessary premiums.

When the *T. N. No. 73*, with an experienced captain and mate aboard, went alongside of the *Athelsultan* on October

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\* The trade name of your respondent, inadvertently used in the pleadings, was corrected at the trial to the proper corporate title, without objection (R. 23).

23rd, 1937 (R. 266, 268), there was on the steamship an inspector named Carpinello, who, with his assistant Lanza represented cargo interests, and whose duties in supervising the cargo included inspection and approval of the barges which were to receive the molasses from the steamship (R. 165, 167, 170, 171, 175). Carpinello, accompanied by respondent's marine superintendent, inspected the *T. N. No. 73* before she commenced to receive the molasses, and found that her tanks were dry and clean, and admitted that if he had found any evidence of leakage he would not have "passed" the barge. He advised his assistant Lanza that the barge was "All right" (R. 55, 56, 170, 175, 186, 273).

It is undisputed that, with a cargo of heavy density like molasses, a full load would be less, in volume, than the cubic capacity of the tanks, and that the customary method of determining the full load (weight) of a barge like the *T. N. No. 73*, is by observation of the proper height of the deck above the water,—freeboard. There is ordinarily no gauge to measure the flow of the cargo in gallons, and, even if there were a gauge, the cubic volume would not disclose the exact amount of weight in the absence of knowledge of the specific gravity of any given cargo. There is a considerable variation in the specific gravity of cargoes of molasses (R. 27, 28, 29, 48, 108, 183, 268).

When the *T. N. No. 73* commenced to receive the molasses from the *Athelsaltan* at about 9.05 P. M. on October 23rd, the flow was first fed into the two forward tanks. The barge captain then retired to his cabin, leaving the loading in charge of the mate (R. 268, 269).

At some time which the mate did not note definitely, but which he "judged" to be "around 11.00 or 11.30" (R. 128-129), he found that the bow end of the barge was down to

a required freeboard of 23 inches under the weight of the molasses in the forward tanks, which indicated that the forward tanks had in them about half of their capacity load (R. 145). Thereupon, in accordance with customary practice, he closed the valves into the forward tanks and commenced the flow of molasses into the stern tanks, intending to bring the stern down to a freeboard of 14 inches and then complete the loading by equalizing all the tanks. Shortly before 1 A. M. on October 24th, the mate allegedly observed that the stern of the barge was down to within 1 inch of the proper limit, and started forward to shut off the flow into the stern tanks, but stopped for a conversation with someone on the deck of the steamship, which apparently diverted him and delayed his operation of the valves. As he finally turned towards the valves he felt the barge settle, or "slump" by the stern, and by the time he had gotten aft to call the captain out of the cabin, the stern was so far under water that the two men on the stern deck were waist-deep. During all of that time the cargo was continuing to flow into the stern tanks, and before the captain or mate could reach the valves and shut off the flow, the barge went down by the stern, and they were obliged to abandon her. The bow lines and hose connection held the forward end for a while but later parted and the barge went to the bottom (R. 132-141, 143-144; 268-270).

The mate said that the first "slump" of the barge by the stern felt as though a line were breaking off a cleat (R. 140). The barge had been moored alongside the *Athelsultan* by four lines running from her bow and stern corners to the ship. The lines were practically brand new, and (as stipulated at the trial) each line had a tensile strength of 22,000 pounds, so that the combined tensile strength of the two stern lines was about 20 tons (R. 147; 268). During the course of loading the barge, it was neces-

sary to slacken the mooring lines to avoid "hanging", as the barge settled and the steamship lightened in draft (R. 131). The mate's testimony indicated that he had not given proper attention to the stern lines during the last stages of the loading (R. 131, 141, 142); and it is probable that during the last few minutes before the final "slump" the tautened stern lines were holding the stern so as to create a false freeboard and disguise the excess load in the stern tanks. The final breaking or rending of the lines would have dropped the stern, which, in turn, would have caused the molasses in the tanks to run aft, thus shifting the center of gravity and accelerating the sinking of the barge by the stern (R. 148).

Whether the mate's testimony be accepted at its face value, or whether he be suspected of having fallen asleep in his cabin and afraid to admit the fact (R. 132), the proofs would seem to establish his negligence in his inattention to the final loading of the stern tanks, and his failure to shut off the flow of molasses into those tanks at the proper time.

After the sinking, and in the course of raising the sunken barge and her cargo, the salvors' diver inspected the sunken boat, and found no escape of molasses to indicate any leakages in the hull (R. 271).

After the barge had been raised and her damaged cargo discharged, she was inspected on drydock by the respondent's Port Superintendent and by five experienced surveyors, including a representative of cargo interests, who were specially endeavoring to discover the cause of the sinking. They were unable to find any indication of defective or unseaworthy condition in explanation of the sinking. The sides, ends, and bottom of the barge were sound and seaworthy, with the exception of keel plates on

either side, which had been cut and damaged by the wire slings used by the salvors to raise the sunken barge (R. 70, 115-116, 118, 121-122, 124-125, 156-158, 193, 200-203, 271). It cannot be argued that that damage could have concealed some earlier damage in the same area, because it was all in the way of the cargo tanks, where any previous leakage would have entered directly into the cargo tanks even while the barge was floating light in the water (R. 117, 125); and Carpinello's testimony squarely negated any such condition (R. 175, 186).

The only other damage to the barge was in the destruction of her cabin and the buckling of deck plates, all of which was attributed, without dispute, to the strain of the sinking and of the raising operations (R. 121, 157).

No builder's plans of the *T. N. No. 73* were available, and the company which had constructed her had gone out of business (R. 26, 36). However, on authenticated calibration tables showing the cubic capacity of the barge's tanks, and upon careful measurements taken while the barge was on drydock, an experienced marine architect and engineer was able to determine her buoyance and displacement (R. 146-147; Ex. 4, R. 259), and on the testimony of the method of loading, and the total weight of cargo, he found that the quantity of molasses which had been pumped into the stern tanks of the barge was more than sufficient to sink her by the stern (R. 147-151).—The computation which the expert had prepared before trial was based upon what he understood to be the weight of the cargo and the bow freeboard of the barge, and on that estimate his computation showed an excess weight in the stern tanks of 60 tons (R. 150-151). After the trial had been concluded, and at the request of the trial judge, the expert recast his computations upon the figures found and accepted by the court; and on that basis the excess weight pumped into the

stern tanks amounted to 101.5 tons (R. 244-246; Ex. 9, R. 235).

During the period from 1928 to the time of this accident, respondent was the time-chartered owner of the *T. N. No. 73* (R. 25-26), and had maintained her in tight, staunch, and strong condition through the daily supervision of her master or mate on board, weekly inspections by respondent's experienced marine superintendents, periodic inspections by hull insurers, and by periodic drydockings and upkeep repairs (R. 30, 31, 55, 155-156). The barge had been drydocked and inspected in May, 1937, and the minor repairs then found necessary were made, and in the ordinary course of operation no further drydocking would have been deemed necessary during the period from May to October, in the absence of any accident (R. 31, 43, 47-48; 272-273; Ex. 2, R. 228).

During the period of years from 1928, respondent had used the barge for the carriage of liquid cargoes in bulk without damage (R. 30). A cargo of beet molasses had been carried without incident a few days previously to October 23rd, 1937; and no accident or damage had occurred to the barge in the interval (R. 272-273).

During the entire trial petitioner had in court a well-known and experienced surveyor (R. 206, 212), who did not in any way criticize or dispute the computations and proofs of respondent's experts Haight and Jeffcott, and no evidence was offered by your petitioner to contradict in any respect the propriety of the method of operations under which the *T. N. No. 73* had been receiving the cargo at the time of the accident.

There is not in the record a scintilla of affirmative proof that any seawater found its way into the barge before the

sinking occurred, or that the sinking was due to unseaworthiness in any respect.

#### IV. *The Pleadings.*

In addition to the cargo damage, the accident allegedly caused damage to the owner of an adjacent dock because of obstruction by the sunken barge (R. 4). Accordingly, pursuing the admiralty practice and to marshal all claims in one proceeding, the respondent, as time-chartered owner of the *T. N. No. 73*, filed a petition for exoneration from or statutory limitation of liability, alleging that the sinking was due to negligence of its employees in loading the stern tanks, without its privity or knowledge (R. 2-6).

Commercial Molasses Corporation, the only claimant in the limitation proceedings, filed an answer in which it alleged that unseaworthiness was the cause of the sinking (R. 6, 8).

At the opening of the trial, on due notice to opposing counsel, a motion was made, and was allowed by the Court, to amend the petition for limitation of liability by praying that the claim of Commercial Molasses Corporation be dismissed in accordance with the provisions of the private contract of carriage, because of your petitioner's failure to procure the agreed insurance for account of respondent and its barges (R. 23-24).

#### V. *The Basis of the Decisions Below.*

The case was tried before Judge Leibell from October 26th to 28th, 1938. Thereafter, the case was reopened by the trial judge on his own motion, and, in accordance with his request, additional evidence was furnished at a further hearing on March 3rd, 1939 (R. 216, 244).

The trial judge denied the limitation of liability (which would have run against all possible claimants), but dismissed your petitioner's claim by reason of the terms of its contract with respondent (R. 281, 285). The basis of his decision was as follows:

(a) He stated that because the barge had sunk in smooth water, without "external contact" of any kind, there was a presumption of unseaworthiness (R. 253, 280); but, after considering all the facts and circumstances disclosed by the proofs, he was of the opinion that "The best that can be said of the state of the record is that the cause of the accident has been left in doubt" (R. 258, 280).

(b) In that situation, he concluded that there was a presumption of unseaworthiness *in law*, which your respondent had not rebutted, and he denied limitation of liability on the rule of "personal contract" (R. 258, 280-281).

(c) He concluded, however, that your petitioner's claim was barred because the insurance clause of the contract was plainly intended to include losses due to unseaworthiness, and that the clause was valid in a contract of private carriage (R. 258-264; 280-285).

Commercial Molasses Corporation appealed to the Circuit Court of Appeals for the Second Circuit only from that portion of the final decree which dismissed its claim (R. 286). New York Tank Barge Corporation, by cross-assignments of error, asked a review of the denial of limitation of liability (R. 287).

The Circuit Court of Appeals, accepting the finding of the trial judge that the cause of the sinking had been left in doubt (R. 293), ruled that, as the contract was one of private carriage and the relationship between the parties was merely that of bailor and bailee, Commercial Molasses Corporation had failed to sustain its burden of proving

the alleged unseaworthiness of the barge as the cause of the sinking; and accordingly affirmed the decree below (R. 296, 297). The Circuit Court of Appeals emphasized the point that an inference of unseaworthiness is a "rational" inference, depending upon the facts; and that, when the trial judge found the cause of the sinking "in doubt", he did not infer unseaworthiness, in fact (R. 297).

#### VI. *The Questions Presented.*

Petitioner's appeal relates solely to the dismissal of its claim, and that turns upon the basic question whether the claim is barred under the specific provisions of the private contract of carriage because of petitioner's failure to procure the promised insurance.

Petitioner's case before this Court is in effect as though petitioner had originally libelled the barge and respondent in a direct suit for the loss of or damage to the cargo of molasses, and respondent had admitted that the sinking was due to the negligence of its employees in filling the stern tanks and had thereupon rested its defense upon the provisions of the private contract and petitioner's admitted failure to procure the promised insurance.

Petitioner's argument that the insurance clause of the contract did not cover losses due to unseaworthiness is contrary to the language of the agreement, and finds no support in the surrounding circumstances. In an attempt to bolster that argument, petitioner now suggests that the clause of the contract was merely intended to give to respondent the benefit of any insurance which petitioner carried for itself (Petitioner's Brief, pp. 44-45). But this was not a "benefit of insurance" clause. It was an agreement to procure insurance directly for the account of respondent and the barges,—which had nothing to do with petitioner's own insurance.

As to the burden of proving unseaworthiness, petitioner's brief repeatedly misstates the "factual" basis of an inference of unseaworthiness and ignores the point that when the trial judge found that the "record" left the cause of the sinking in doubt, he was unable to infer as a "fact" that unseaworthiness was the cause, with the result that unseaworthiness was not proven either affirmatively or by inference.

Petitioner further confuses the issues involved by lengthy and numerous quotations from cases which relate to the liability and burden of proof of common carriers who seek to escape responsibility for cargo damage under bill of lading, or statutory, exemptions. The distinction was referred to by the Circuit Court of Appeals (R. 296-297).

### FIRST POINT.

THE DISTRICT COURT RIGHTLY HELD THAT PETITIONER'S CLAIM IS BARRED BY THE TERMS OF THE INSURANCE CLAUSE OF THE PRIVATE CONTRACT OF CARRIAGE.

The lower courts held (R. 281; R. 296), and the petitioner does not dispute, that the contract herein was a contract of private carriage (admitted at page 27 of Appellant's brief).

*Producers Transp. Co. v. Railroad Comm.*, 251 U. S. 228;

*The Wildenfels*, 161 Fed. 864, 866;

*The C. R. Sheffer*, 249 Fed. 600, 601;

*Gerhard v. Cattaraugus Co.*, 241 N. Y. 413;

*The G. R. Crowe*, 294 Fed. 506;

*The Fri*, 154 Fed. 333;

*The Nat Sutton*, 62 F. (2d) 787;

*Koppers v. McWilliams Blue Line*, 18 F. Supp. 992; aff'd 89 F. (2d) 865.

A private carrier is not an insurer, as a common carrier is. He is merely a bailee, and is liable only for negligence, as in any ordinary bailment.

*Southern Ry. v. Prescott*, 240 U. S. 632, 640;  
*The C. R. Sheffer*, 249 Fed. 600, 601;  
*The Wildenfels*, 161 Fed. 864, 866;  
*Kohlsaat v. Parkersburg etc. Co.*, 266 Fed. 283;  
*Alpine Forwarding Co. v. Penn. R. R. Co.*, 60  
 F. (2d) 734;  
*Gerhard v. Cattaraugus Co.*, 241 N. Y. 413;  
*Lancashire Shipping Co. v. Morse D. D. Co.*, 43  
 F. (2d) 750; *aff'd* 48 F. (2d) 1077;  
*Federal Ins. Co. v. Herreshoff*, 6 F. Supp. 827;  
*United States v. Todd Engineering etc. Co.*, 53  
 F. (2d) 1025.

Inasmuch as the reasons of public policy which apply to a common carrier do not apply to a private carrier, the latter is free to contract on such terms as he may arrange with the shipper, and is therefore free to contract that he shall not be liable, even for negligence.

*Santa Fe Ry. v. Grant Bros.*, 228 U. S. 177,  
 185, 188;  
*The G. R. Crowe*, 287 Fed. 426, *aff'd* 294 Fed.  
 506;  
*Koppers v. McWilliams Blue Line*, 89 F. (2d)  
 865.

Petitioner's claim was dismissed in the District Court, in accordance with the plain terms of the contract of private carriage, and in accordance with the stipulation therein, for petitioner's failure to insure the cargo for respondent's account. As the parties had complete free-

dom of contract, their agreement as to the insurance was entirely proper and valid. The agreement was:

"It is agreed that the \* \* \* Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co. Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc., and/or the owners of such barges; and that neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected" (R. 232).

In spite of petitioner's widespread theories, the plain fact is that this clause meant exactly what it said,—that, without any exception, the cargo would be insured for respondent's account, and that, on any failure to procure the said insurance, respondent should not be liable. The language and the surrounding circumstances of the contract do not support petitioner's argument that the Court should read into the insurance clause an intent of the parties to exclude insurance on losses due to unseaworthiness. Ordinary Marine policies of this character cover losses due to unseaworthiness.

*Hanover Fire Ins. Co. v. Merchants Transp. Co.*,  
15 F. (2d) 946;

*Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640.

In lieu of an implied warranty of seaworthiness of the barges to be used in the carriage of petitioner's molasses under the contract, respondent expressly undertook to maintain the boats in tight, staunch, and strong condition, and fit for the molasses (R. 232). Your respondent does not deny that undertaking. Respondent does not question the established law as to expressed or implied warranties of seaworthiness (Petitioner's brief, pp. 9-12). But there is no law, and petitioner does not suggest any, to prevent

a vessel owner from insuring against the possible consequences of the warranty. *Hanover Fire Ins. Co. v. Merchants' Transp. Co.*, 15 F. (2d) 946, 948. The question here is merely whether the Court should assume that the insurance which was to be furnished by petitioner for respondent's account was to be something less than the agreement plainly provided.

The respondent's undertaking to maintain the boats related not only to the boats which it owned but also to the boats which it might operate under charter. Respondent, as charterer of any boat, might normally have passed on to the owner of that boat the responsibility for any unseaworthiness, but, nevertheless, undertook the responsibility, so far as petitioner was concerned, in the performance of this private contract of carriage.

It is a reasonable inference that respondent, when considering insurance of its possible liabilities to petitioner, as they might arise in the performance of the contract, wanted insurance against losses due to unseaworthiness as much as other causes, particularly because of respondent's undertaking to maintain its chartered boats as well as its own boats. It is not open to question that respondent itself could have procured that inclusive insurance at its own expense, and could have included the cost thereof in the freight rates quoted to petitioner.

*Great Lakes Corp. v. S. S. Co.*, 301 U. S. 646;

*Sorenson v. Boston Ins. Co.*, 20 F. (2d) 640.

*Hanover Fire Ins. Co. v. Merchants Transp. Co.*,  
15 Fed. (2d) 946.

Inasmuch as the contract was one of private carriage and the parties were free to contract as they saw fit, there was nothing to prohibit the arrangement between them that the insurance which respondent might have procured for itself would be procured for respondent's account by the

petitioner, thus placing the expense thereof upon the petitioner. That was the plain intent of the insurance clause in the contract. It is a reasonable inference that that arrangement was reflected by a lower freight rate,—as the trial judge commented (R. 282-283).

In such a situation, there is no logical basis for the petitioner's contention (particularly in the absence of any direct testimony to support it), that the insurance clause of the contract was intended to relate only to damage or losses resulting from causes other than unseaworthiness. There is nothing in the language of the clause to support the contention. To the contrary, the words "any loss", in the concluding phrase, plainly indicated that the parties understood the agreement to cover all causes of loss. Petitioner's argument not only disregards the language of the clause itself, but also ignores the plain and logical situation which arose when petitioner undertook to procure for the respondent the insurance which respondent might have procured for itself.

It is on that basis that the trial judge, overruling the petitioner's argument, concluded that the intent of the insurance clause of the contract was to cover all losses, including those due to unseaworthiness.

"Claimant\* contends that because the contract contains an express warranty of seaworthiness, the insurance clause was not intended to cover losses due to unseaworthiness. The warranty was made to the claimant; it would not ordinarily be made to an insurer if the petitioner were obtaining a policy on the cargoes to be carried in its barges. Petitioner could have obtained insurance to cover cargo losses due to unseaworthiness. There is no implied warranty of seaworthiness in a legal liability, or protection and indemnity, policy, obtained by a ship or

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\* The present petitioner was the claimant in the District Court, and the present respondent was the petitioner.

lighter owner on the cargoes to be carried in its vessels; such a policy insures damage to cargoes due to the unseaworthiness of the vessels. See, *Sorenson v. Boston Insurance Co.* 20 F(2d) 640 \* \* \* (R. 281).

"To add by implication to the broad and general language of the insurance clause, an exception of losses resulting from the unseaworthiness of the barge, would leave the barge owner without insurance that he otherwise might have obtained—a result that would be manifestly unfair. The barge owner had the right to assume that the insurance clause in the contract of carriage meant just what it said, without any implied exceptions \* \* \*" (R. 284).

"As we have seen, the petitioner could have taken out insurance on its own account which would cover cargo losses due to unseaworthiness. In fact, having warranted the seaworthiness of the barges to the claimant, it would seem that insurance covering such a contingency would be the kind most desired by the petitioner. I am of the opinion the aforementioned insurance clause of the contract of carriage was intended to cover any losses the carrier (petitioner) could have insured against, including cargo losses due to unseaworthiness. Since claimant (or its predecessor) contracted to obtain such insurance and did not do so, I am of the opinion that the petitioner should be granted exoneration from liability." (R. 284.)

Petitioner argues that unless unseaworthiness were excluded, the insurance clause would nullify the respondent's warranty of seaworthiness. That argument has no basis in either fact or law. Insurance presupposes a liability for which the insurance is to furnish protection. It does not nullify or remove the obligation on which the liability may arise.

If petitioner had procured the promised insurance for the respondent's account protecting respondent against any liability for loss or damage to the cargo, it is self-evident that the said insurance could not have attached unless petitioner claimed and established a liability of respondent.

Consequently, the phrase in the insurance clause which provided that respondent should not be liable for any loss in respect of which insurance "has been" effected could not have meant (as petitioner argues), that no claim could be presented against respondent if the insurance were procured. Such an interpretation would reduce the whole clause to a nullity. The plain meaning of the phrase referred to was to insist that the insurance be procured by petitioner for respondent's account in such form that the underwriters, upon payment of loss, would not be permitted to pass the liability on to respondent and its barges by right of subrogation,—as petitioner's underwriters are now attempting to do (R. 164). Assuming that that meant payment of an extra premium by petitioner, as petitioner's brief argues (p. 45), it was presumably equalized by a lower freight rate.

Thus, the insurance in no way modified the warranty of seaworthiness, but was intended to protect the respondent against any liability which might arise by reason of the warranty. The trial judge so held:

"Claimant argues that the result of this interpretation of the insurance clause would be to nullify the express warranty of seaworthiness contained in the same contract of carriage. I do not see it that way. If the charterer,"—(claimant?)—"the claimant herein, had lived up to its obligations under the insurance clause, it would not thereby lose the benefit of the personal warranty of seaworthiness. That warranty would still be in effect and in the event of a loss to the cargo, resulting from the unseaworthi-

ness of the barge, claimant could hold both the petitioner and the barge. \* \* \* If the insurance company reimbursed petitioner under the policy claimant was required to obtain for the account of the petitioner, that would not be money out of claimant's pocket; and of course, the insurer would have no right of subrogation against claimant. \* \* \* The premium on the policy is all that the insurance would have cost the claimant, and even the premium would indirectly be borne by petitioner in the freight rate provided in the contract of carriage, which undoubtedly would have been higher if petitioner had to procure its own insurance for cargo losses" (R. 283-284).\*

At pages 50-51 of its brief, petitioner states that it would be "against public policy" to require petitioner to provide insurance to protect respondent against a breach of warranty of seaworthiness. But it is clear from the authorities already cited herein that no question of public policy is involved, because this was a contract of private carriage. Many of the cases cited by petitioner in its Point VI comment on the fact that a private carrier might, by contract, eliminate the warranty of seaworthiness. *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U. S. 82, 88; *The Turret Crown*, 297 Fed. 766, 775; *The Framlington Court*, 69 F. (2d) 300, 303. If the warranty itself might be nullified by contract, there is no public policy to forbid a contract for insurance against the consequences of the warranty.

The whole of petitioner's Point VI (pp. 40-53) is an attempt to escape the finding of the trial judge that the

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\*The Circuit Court of Appeals, in its opinion, said that the trial judge had concluded that the insurance clause relieved the Barge Company of the covenant of seaworthiness (R. 293). That would seem to be clearly a mistaken interpretation of the trial judge's conclusion.

insurance clause contemplated direct insurance for respondent's account, such as respondent itself might have taken out. The experienced counsel for petitioner know well that such insurance would have covered respondent for cargo losses due to unseaworthiness, as shown in the cases cited above.

Petitioner's argument is wrongly based on the contention that the agreement here was for petitioner to give the benefit of its insurance to the respondent. On that basis, petitioner argues that it could not have undertaken to void its own underwriters' rights, by subrogation, against respondent, with respect to unseaworthiness (Petitioner's brief, pp. 44-45).

But the clause here was not a "benefit of insurance clause." It said nothing about petitioner's insurance. Respondent did not care whether petitioner carried any insurance. Respondent was concerned only in its own direct insurance, and it was such insurance that petitioner agreed to procure for respondent's account. The trial judge so held (R. 282).

Similarly, the lengthy quotation from *Nelson Line, Ltd. v. James Nelson & Sons, Ltd.* (Petitioner's brief, pp. 47-48), has no application here, and merely confuses the issue, because in that case the contract was to release the shipowner from damage "which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance." That agreement related solely to the cargo owner's insurance, which is something quite different from insurance for the direct account of the vessel owner.

In the present case, the concluding words of the insurance clause were plainly intended to bar claims against the respondent for which the agreed insurance could have been effected,—i. e., the direct insurance for respondent's account. The trial judge so found (R. 283).

Again, at page 52 of its brief, petitioner seeks to argue that it had agreed only to procure "cargo insurance",— i. e., the insurance which is available to a cargo owner. But the insurance clause of the contract did not so state. The agreement was to insure the cargo for respondent's account, which could only mean the type of insurance which would protect the respondent as carrier.

The authorities cited by petitioner in its Point VI have no bearing upon the insurance clause involved here, and no authority is shown for the argument that the clause did not mean exactly what the trial judge concluded.

On pages 40-45 of petitioner's brief, there is a lengthy discussion of the original rule under which marine underwriters did not insure losses due to unseaworthiness, but, as petitioner's experienced counsel know well, marine underwriters have long since offered, both to cargo-owner and shipowner, insurance in such form as to protect the insured even when the loss is due to unseaworthiness, as shown by the petitioner's policy herein (R. 238), and in the cases of *Great Lakes Corporation v. Steamship Company*, 301 U. S. 646, and *Sorenson v. Boston Insurance Co.*, 20 F. (2) 640. Petitioner's entire discussion of this question of insurance is misleading, because of its unwarranted attempt to convey to the Court the impression (unsupported by any proofs) that the meaning of the insurance clause herein as defined and found by the trial judge would not be consistent with the forms of marine insurance which are now in everyday use.

The cases of *Nelson Line Ltd. etc., The Titania*, *The Hadji*, *The Egypt*, and *The Anna*, (Petitioner's brief, pp. 48, 50), involved bill of lading agreements to relieve the carrier from liability for losses capable of being insured

by the shipper for his own account. Other cases, such as *Luckenbach v. W. J. McCahan*, *Sanbern v. Wright & Cobb*, and *The Turret Crown*, (Petitioner's brief, pp. 44, 48, 52), involved bill of lading clauses giving to the carrier the benefit of any insurance which the shipper himself carried. Such agreements were quite different from the petitioner's agreement herein to provide insurance for respondent's account. Moreover, most of those cases related to common carriers, and reasons of public policy affected the construction given to the bill of lading agreements.

Throughout the entire argument on this point, the petitioner's good faith is subject to suspicion because of the admitted fact that it did not procure any insurance for the respondent's account, and failed to offer the slightest excuse for that breach of its agreement. And its good faith is further open to suspicion by reason of the concluding statements on pages 52-53 of its brief, where it tries to suggest that it should be relieved from the breach of contract on the theory that respondent had procured its own insurance. Even if the assumed fact were true, it would offer to petitioner no defense for its own breach. But there is no proof or admission in the case that this cargo of molasses was insured by respondent. The *T. N. No. 73* was used to carry for other parties besides petitioner, and the fact that she was "entered with" an insurance company for cargo losses in no way admitted that she was insured on petitioner's cargoes of molasses.

For the foregoing reasons, respondent submits that the trial judge rightly dismissed your petitioner's claim under the terms of the contract, irrespective of the proof of unseaworthiness of the barge; and that, as the parties to this contract of private carriage had complete freedom of contract, petitioner cannot now seek to modify the plain terms

of its agreement. As this Court stated in *Santa Fe Ry. v. Grant Bros.*, 228 U. S. 177, at page 188:

"The parties then were free to make their own bargain as to this transportation and the liability which should attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made."

## SECOND POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS ON THE BURDEN OF PROOF IS IN ACCORD, AND NOT IN CONFLICT, WITH ESTABLISHED LAW.

On pages 7, 16, 29 and 32-33 of its brief, petitioner's characterizations of the decision of the Circuit Court of Appeals are grossly inaccurate, and disclose petitioner's lack of candor in its argument on this point.

Your respondent has not sought to dispute the law as to an owner's warranty of the seaworthiness of his vessel, and neither of the lower courts has departed in any way from that law. The warranty itself and the burden of proving a breach thereof are two different things.

As between bailor and bailee, in a case of private carriage, the bailor has the burden of proof, which remains on the bailor throughout. The failure of the bailee to return the goods may place upon him the burden of going forward with an explanation, but if he shows that his failure to return was due to some disaster such as the sinking of the

*T. N. No. 73*, the burden still remains on the bailor to prove that the disaster occurred through the bailee's negligence.

In the case of *Southern Ry. v. Prescott*, 240 U. S. 632, at page 640, this Court said:

"It was explicitly provided that in case the property was not removed within a specified time it should be kept subject to liability 'as warehouseman only.' The Railroad Company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a *prima facie* case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence."

In *Kohlsaat v. Parkersburg*, 266 Fed. 283, at page 285, the Court said:

"A bailee for hire is not an insurer of the property placed in his possession, and cannot be held to answer if it be lost or damaged without his fault.\*\*\* Hence the essential element of a bailor's cause of action, the fact to be established by him, is negligence on the part of the bailee. On that issue the burden of proof rests all the while on the plaintiff, and at no stage of the trial can it be passed over to the defendant."

In *Steamship Co. v. Norden*, 6 F. (2d) 883, at page 887, the Court said:

"In other words, if there is no preponderance of evidence, and the matter remains in doubt after full

disclosure on the part of the carrier, the loss falls upon the bailor for the reason that he has failed to sustain the burden of proof."

To the same effect are:

*Robert A. Munroe Co. v. Chesapeake Lighterage  
& Towing Co. Inc.*, 283 Fed. 526, 529;  
*Delaware Dredging Co. v. Graham*, 43 F. (2d)  
852, 854.

In considering the application of the rule to the present case, it must be emphasized that respondent, as bailee, did not seek to deny negligence, but offered evidence that the sinking was due to its employees' negligence in overfilling the stern tanks.

The issue of unseaworthiness was raised by petitioner because it could not recover damages unless that specific negligence were the cause of the sinking. Respondent (petitioner below) obviously had no privity or knowledge of any negligence of its employees in overfilling the stern tanks (R. 89), and would have been entitled to limit liability with respect thereto, *The George W. Pratt*, 76 F. (2d) 902; and petitioner could not have argued that the insurance clause of the contract was not intended to cover loss or damage from such cause. Petitioner could not hope to defeat limitation of liability or offer its present argument in excuse of its breach of the contract unless unseaworthiness were the cause of the sinking. Petitioner recognized that situation by pleading specifically that the barge sank by reason of unseaworthiness (R. 8, 14).

Thus, in addition to its burden of proof under the general rule, petitioner, as bailor, had the burden of proving the specific negligence on which it sought to recover,—unseaworthiness. A party who claims damage by reason

of some specific negligence has the burden of proving it and also that it was the cause of the damage. *Clark v. Tug Bear*, 11 F. (2d) 607, aff'd without opinion, 11 F. (2d) 508; *Eclipse Lighterage & Transp. Co. v. Cornell Steamboat Co.*, 242 Fed. 927; *The Asbury Park*, 147 Fed. 194.

Petitioner did not offer any affirmative proof that seawater entered the *T. N. No. 73* before the sinking or that the sinking was due to unseaworthiness in any respect,—in spite of the fact that representatives of cargo inspected the barge before loading, were present during the loading, were present when the barge was raised after the accident, and inspected her again on drydock (R: 165, 175, 190, 193). Petitioner rested its case solely on an assertion that the facts and circumstances of the sinking raised a “presumption” of unseaworthiness.

As the Circuit Court of Appeals commented (R. 297), the so-called “presumption” of unseaworthiness is not a true presumption,—such as this Court considered in *Del Vecchio v. Bowers*, 296 U. S. 280, 285. It is merely a “rational inference” which arises, if at all, only upon the facts of the case. It must be based upon the evidence and the weight thereof.

In *Lindsay v. Klein*, [1911] A. C. 194, Lord Shaw, after stating that “the onus of proving unseaworthiness is upon those who allege it”, outlined the nature of facts which might support the inference of unseaworthiness, and took pains to define the inference as a finding of fact to be drawn from all the evidence.

In the course of his opinion he said:

“My Lords, in view of the manner in which the evidence in this case has been regarded in the Court below, I think it right to give the distinction between the proposition in law that those alleging unsea-

worthiness have the burden of proof of that, and the presumptions arising on facts" (1911 A. C. 204).

In *Pickup v. Thames Insurance Co.*, 3 Q. B. D. 594, the judges of Queens Bench Division and of the Court of Appeals were in agreement that a new trial should be ordered because the trial judge had wrongly instructed the jury that the breakdown of the vessel and her return to port within a certain time after sailing raised a presumption of unseaworthiness in law, and cast upon the owner of the vessel the onus of proving seaworthiness. The judges in both of the higher courts went to some length in pointing out that the so-called presumption did not arise *in law* from the mere time within which the vessel returned but was an inference to be drawn from all the facts and circumstances, and that the burden of proof did not shift, so that the party alleging unseaworthiness had failed to prove it if all of the facts and circumstances left the proofs evenly balanced. In the opinion in that case Cockburn, C. J., said:

"If a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as a matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as in the absence of every other possible cause the only conclusion, which can be arrived at, is that inherent unseaworthiness must have occasioned the result. \* \* \* It is from the entire absence of any other cause than inherent unseaworthiness that the probative value of such a combination of circumstances is derived. Time can enter to a very limited

extent only, if it enters at all, into the question as a factor in leading to the result. It certainly cannot be said of itself and without more, to give rise to any new presumption of law, or as a matter of law to shift the onus of proof from the party on which the law has cast it." 3 Q. B. D. 597-598.

In the same case Lord Cotton said:

"In my opinion the question of time is a question of fact for the jury, and it is for them to say, judging from all the circumstances, whether they are satisfied that the loss was occasioned by her defective condition on starting on her voyage. The direction of Field, J., I think induced the jury to believe the defendants were relieved from proving their plea of unseaworthiness, and that it was for the plaintiff to shew seaworthiness at the commencement of the risk." 3 Q. B. D. 602.

Lord Thesiger said:

"But even in this point of view it seems to me that the learned judge misdirected the jury, and that there was nothing to shew or to justify him in saying that the burden of proof, as a matter of fact, had shifted, because at the very same time that it was proved that a short time had elapsed since the vessel had started, it was also proved that there was weather which might possibly account for the loss which took place. \* \* \*

"If their minds were in that state of equal balance, it follows that is just the occasion when the learned judge must necessarily be most accurate in the language, which he uses to the jury on the point which they discuss with him." 3 Q. B. D. 604, 605.

In both *Lindsay v. Klein* and *Pickup v. Thames Ins. Co.* the courts referred to an earlier statement in *Watson*

v. *Clark*, 1 Dow. 336, 348, in which an inference of unseaworthiness was loosely defined as a presumption in law which shifted the burden of proof; and in the two later cases the courts took pains to show that the inference was one of fact and that the burden of proof did not shift. *Watson v. Clark* was overruled "so far as the House of Lords can ever be said to overrule its own decisions",—as the Circuit Court of Appeals stated herein (R. 294-295).

In *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co. Ltd.*, [1901] A. C. 362 (Petitioner's brief, pp. 26-27), in which insurers sought to defend on an alleged inference of unseaworthiness, Lord Lindley said, at page 366:

"But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship are proved, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established. • • •"

This Court has indicated the "factual" character of an inference of this type, in *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416, 422, 423, by ruling that, in a case at common law, it would be for the jury to determine from all the evidence whether the negligence of the bailee should be inferred.

In *The Transit*, 250 Fed. 71, at page 72, the Court said:

"Such a presumption necessarily arises and alone will sustain recovery in a case where a vessel sinks from an unknown cause under circumstances where she had been subjected to no external peril,

and where nothing but her unseaworthiness can explain the accident. In other words, the presumption of unseaworthiness arises where the only inference in the circumstances is that of unseaworthiness. \* \* \* As the circumstances attending the sinking of the "Transit" do not exclude all inferable causes except that of unseaworthiness, but, on the contrary, very plausibly suggest another cause, the presumption does not exist."

In *The City of Camden*, 292 Fed. 93, at page 96, the Court said:

"From this action her unseaworthiness is presumed, \* \* \* where nothing but her unseaworthiness, as in this case, can explain the accident."

In *The Wm. I. McIlroy*, 37 F. (2d) 909, at page 910, the Court said:

"She was examined by her owner only two weeks before the sinking. At that time she was in good condition. He examined her forward, stern, and sides. She had been carrying cargo right along and there never had been any claim for loss of cargo. The sinking, therefore, could not be a basis for an inference of unseaworthiness.

Thus the burden of going on with the proof of negligence shifted back to the libellant. The libellant proved nothing."

A similar analysis of the nature and basis of the inference was stated in *Oregon Round Lumber Co. v. Portland etc. S. S. Co.*, 162 Fed. 912, at page 921.

The foregoing authorities show that in the present case the Circuit Court of Appeals has not departed from but has adhered to the established law, and that petitioner's devious attempts to convey a contrary impression lay the petitioner's good faith open to serious suspicion.

In the present case there was much uncontradicted evidence that the barge had been maintained in sound condition, that she was found to be in sound condition immediately before taking this cargo, and that even after the accident no condition of unseaworthiness was discovered to explain the sinking. It was undisputed that at the time of the sinking the barge was being subjected to an external force,—the rapid flow of molasses into her stern tanks, which was steadily deepening her by the stern, as though being pressed down by a giant jack, which would sink her by the stern if not stopped seasonably. There was also expert evidence that the quantity of molasses pumped into the stern tanks would have sunk her by the stern.

When the trial judge concluded that such a “record” left the cause of the sinking “in doubt”, it was the equivalent of saying that the surrounding facts and circumstances did not justify an inference, in fact, that unseaworthiness was the cause. He then erred in holding that there was a presumption of unseaworthiness *in law*. The net result was that petitioner, having the burden of proving unseaworthiness, failed to prove it either by affirmative evidence or by an inference based on the known facts.

The more outstanding errors in petitioner’s argument are as follows:

*Misstatement of the basis of inference:* Throughout its brief, petitioner seizes on and repeats the statement of the trial judge that absence of external “contact” would in itself raise an inference of unseaworthiness. The authorities cited above show the error in that statement. There may be external forces or perils, other than “contacts”, which would negative unseaworthiness; and the inference of unseaworthiness does not rest upon any such limited rule of thumb as the trial judge stated, and petitioner now repeats. It arises only when all the known facts offer no

other possible explanation than the inference of unseaworthiness.

The external force which was affecting the *T. N. No. 73*,—the filling of the stern tanks,—was proven without any dispute.

*“Adequate” does not mean “Conclusive”*: Petitioner persists in its statements that no “adequate” explanation other than unseaworthiness was offered by the proofs herein, because the trial judge refused to find that the overfilling of the stern tanks was, in fact, the cause of the sinking. An illustration of that argument is found on page 27 of Petitioner’s brief, in the italics of Lord Lindley’s opinion and the ensuing paragraph of the brief. But Lord Lindley’s language plainly shows that the inference may be negated by facts which, without conclusively proving an alternative explanation, are sufficient to “balance” the evidence. In other words, if the known facts offer two possible explanations between which the court cannot decide, one is quite as “adequate” as the other, and neither is conclusive. There is then no inference of unseaworthiness.

The sinking by reason of the steady and uncontrolled filling of the stern tanks was an adequate explanation as an alternative to unseaworthiness. There was undisputed proof of the existence of that external force to account for the sinking. In *Work v. Leathers*, 97 U. S. 379, 380 (Petitioner’s brief, p. 12), this Court referred to a defect developing without any “apparent” cause.—it did not say “conclusive” cause.

*Petitioner ignores the absence of affirmative proofs from which unseaworthiness might be inferred:* This is well shown in the following words, quoted from the caption of Point V (Petitioner's brief, p. 36).

"After it has been shown that a vessel leaks from some unknown cause while loading, or shortly after the voyage begins, a *prima facie* case of unseaworthiness is made out."

Petitioner thus admits its burden of proof, and at the same time indicates its failure, because it did not offer a scintilla of evidence that the barge leaked before or after the loading commenced.

In the *Edwin I. Morrison*, 153 U. S. 199 (Petitioner's brief, p. 36), it was proven that seawater found its way into the vessel because of the breakage or dislodgment of the cover of a sounding pipe. In the present case there is no proof that any part of the hull or equipment of the *T. N. No. 73* gave way, or that any seawater found its way into her before she sank.

Similarly, in practically all of the fifty or more cases cited in petitioner's brief on pages 12-39, there was affirmative proof of some breakdown of machinery or equipment of the vessel, or affirmative proof of failure to make proper use of the vessel's equipment in the care of the cargo, or affirmative proof of leakage or intake of water, so as to damage the cargo or cause the vessel to founder. Those affirmative proofs of defective conditions were facts on which the courts inferred unseaworthiness, in the absence of proofs of any external forces, circumstances, or perils which might have accounted for the conditions.

In the case at bar, there is not an iota of proof that any part of the hull or equipment of the *T. N. No. 73* gave way or broke down or that any seawater entered the vessel before she sank, or that she was defective in any respect.

In *The Catvert*, 51 F. (2d) 494, and *Cullen No. 32*, 62 F. (2nd) 68, and *The Jungshoved*, 296 Fed. 733, the capsizing, careening, or sinking could have occurred only through the intake of seawater, as the Courts found; and such intake of water, in the absence of any explanation, led to an inference of unseaworthiness. In the case at bar, petitioner asked the Court to assume that the *T. N. No. 73* must have sunk by filling with seawater and to infer that such filling was due to unseaworthiness. But here there is no reason for such an assumption, because, the undisputed fact is that a fluid heavier than water,—molasses,—was pouring into the barge in such manner as to offer just as reasonable an explanation of the filling and sinking as the unproven assumption of leakage might offer.

*Petitioner confuses the issues involved herein by indiscriminate and improper references to the rule peculiar to common carriers.*

The obligation of furnishing a seaworthy vessel, and the burden of proving a breach of that obligation, are two entirely different things.

The burden of proving unseaworthiness is always on the party alleging it, as Lord Shaw stated in *Lindsay v. Klein*, [1911] A. C. 194, 211. There is no authority for the contrary statement, as it appears in the caption of petitioner's Point IV (Petitioner's Brief, p. 29). This confusion arises from what would seem to be the deliberate failure of petitioner to point out the reason for the rule which is peculiar to the law of common carriers.

A common carrier is an insurer. By reason of that fact, he has always had the burden of proving that the cause of the loss was within one of the few exceptions granted him by common law or by later statutory provisions. He cannot bring himself within an exception without estab-

lishing seaworthiness, or due diligence to render seaworthy, as a condition precedent. He must eliminate any doubt, in order to prove the "excuse" which the law affords him. Thus, in petitioner's brief, there are many references and quotations which seem to support petitioner's erroneous statement of the burden of proof, but which actually relate only to the burden which rests on a common carrier as a condition precedent to his relief. *The Wildcroft*, 201 U. S. 378, 388; *The Southwark*, 191 U. S. 1, 13, 16; *May v. Hamburg*, 290 U. S. 333, 346.

### THIRD POINT.

#### THE EXPLANATION OF THE SINKING.

Respondent believes that the trial judge, in considering the questions of inference and burden of proof, erred with respect to the following points.

He erred in concluding that proof of an external "contact" would be necessary to negative an inference of unseaworthiness. Plainly, there are external forces, circumstances, or perils, other than "contacts", which can explain the sinking of a seaworthy vessel. By reason of his error in limiting himself to an external "contact", the trial judge failed to give proper weight to the uncontradicted fact that the *T. N. No. 73* was being submitted to an external force,—the rapid flow of molasses into her stern tanks,—which could have accounted for the sinking.

In the absence of any affirmative proof of a breakdown or defective condition of the hull, or of the intake of water previously to the sinking, the trial judge overlooked the complete lack of support for an inference that the barge sank through leaking and filling with water. The undis-

puted proof was that the barge was filling rapidly with a fluid heavier than water,—molasses,—which would have tended to sink the barge quite as readily as any intake of water; and, in the absence of any proof of defective condition or leakage before the sinking, there was no basis for the Court to infer that the barge sank by reason of an unproven intake of water, rather than by reason of the proven intake of molasses.

The net result of the uncontradicted evidence in the case was to show as persuasively as could be expected or required in a case of this type that the barge sank by reason of the overfilling of her stern tanks. As his opinion clearly indicates (R. 253-258), the trial judge thought that he could not accept the proofs of the overfilling of the stern tanks so long as he was unable to make the factors of time, flow, and weight, tally with arithmetical precision. Your respondent respectfully submits that the law does not require any such degree of precision in the proofs of a case of this type, where, for obvious reasons, no such precision is possible.

The mate of the barge did not pay any attention to the exact time of shifting the flow from the forward to the stern tanks, and when the trial judge was unable to fit his estimate of "11.00 to 11.30" into the arithmetic of the case, the fair conclusion was that the estimate of time was wrong. But the fact was proven without contradiction that after the forward tanks had been only partly filled, the balance of the molasses was pumped into the stern tanks up to the moment of disaster. Whether the forward tanks were loaded down to the 26' freeboard which the mate described, or whether they were loaded to a freeboard of only 12", the balance of the molasses pumped into the stern tanks was

more than sufficient to sink the barge by the stern (R. 150-151; 244-246).

Respondent believes that the foregoing points all have a direct or indirect bearing upon the questions decided by the lower courts. Inasmuch as an appeal in admiralty is a trial *de novo*, this Court may review the case to the extent that it deems necessary in the interests of justice. It may particularly give its consideration to errors of the trial court, correction of which would tend to sustain the decree appealed from. *Lagues v. Greene*, 282 U. S. 531, 538, 539.

### CONCLUSION.

THE DECREES OF THE LOWER COURTS SHOULD BE AFFIRMED.

Respectfully submitted,

ROBERT S. ERSKINE,  
CLETUS KEATING,  
L. DE GROVE POTTER,  
RICHARD SULLIVAN,  
Counsel for Respondent.

New York, N. Y.,  
February 25th, 1941.



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IN THE

Supreme Court of the United States

~~(Syllabus, Vol. 100)~~

~~Supreme Court~~

OCTOBER TERM, 1941.

No. 14.

COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

*against*

NEW YORK TANK BARGE CORPORATION, as Chartered

Owner of the Tank Barge *T. N. No. 73,*

*Respondent.*

A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT  
ON REHEARING.

ROBERT S. ERSKINE,

CLETUS KEATING,

L. DE GROVE POTTER,

RICHARD SULLIVAN,

*Counsel for Respondent*



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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 584.

OCTOBER TERM, 1941.

No. 14.

COMMERCIAL MOLASSES CORPORATION,  
Petitioner,

*against*

NEW YORK TANK BARGE CORPORATION,  
as Chartered Owner of the Tank  
Barge "T. N. No. 73",  
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT  
ON REHEARING.

I.

ARGUMENT.

Since the first hearing of this case before this Court there has appeared a recent English decision by the House of Lords in *Imperial Smelting Corp. Ltd. v. Constantine S. S. Line, Ltd.*, Lloyds Law Reports, Vol. 70, No. 1, July

8th, 1941, page 1. That case arose out of the frustration of a charter party due to a boiler explosion on the vessel shortly before she entered on the charter party. The charterer proceeded against the shipowner for damages. The fact-finder was unable to find from the testimony either that the explosion was, or that it was not, due to negligence or default of the owner, and concluded that the cause of the accident had not been proven. The House of Lords, reversing the Court of Appeals and reinstating the opinion of the Kings Bench, held that the burden was on the charterer to prove negligence or default of the owner, and that under the findings of fact the burden had not been sustained. Viscount Simon and Lord Wright, in their separate opinions, made the following comments as to the burden of proof on the ordinary issue of negligence or unseaworthiness:

*Viscount Simon:*

(p. 7) "Where the onus is on the shipowners, under the first principle, that onus is discharged by proving facts from which the inference that the accident was not caused by negligence is as equally strong, that is, equally consistent with the facts as the inference that it was caused by negligence." (Quoting from *Abrath v. North Eastern Ry. Co.*, 11 Q. B. D. 440, 456.)

(p. 9) "If a ship sails and is never heard of again, the shipowner can claim protection for loss of the cargo under the express exception of perils of the sea. To establish that, must he go on to prove (a) that the perils were not caused by negligence of his servants, and (b) were not caused by any unseaworthiness? I think clearly not. He proves a *prima facie* case of loss by sea perils, and that he is within the exception. If the cargo-owner wants to defeat

that plea it is for him by rejoinder to allege and prove either negligence or unseaworthiness. The judgment of the Court of Appeal in *The Glendarroch* (1894), p. 226, is plain authority for this."

*Lord Wright:*

(pp. 22-23) "The maxim *respicere finem* applies, though there may be provisional presumptions shifting the onus of proof from time to time during the progress of the case. This is well illustrated in *Ajum Goolam Hossein & Co. v. Union Marine Insurance Company*, [1901] A. C. 362, an action on a marine insurance policy for the loss of a ship which had sunk through causes not explained. The defence was that the ship was unseaworthy. The underwriters showed facts which raised a presumption in favour of unseaworthiness, and shifted at that stage the onus of proof, but at the end the Court held that the real cause of the loss was unknown, that unseaworthiness was not proved and that the defence failed. In the same way, if negligence is alleged to override the defence of excepted perils, it must be alleged and proved affirmatively. If the matter is left in doubt when all the evidence has been heard, the party who takes upon himself to affirm fault must fail. \* \* \*

"On the ruling of the Court of Appeal, the ship-owner has placed upon him the unusual task of proving a negative. \* \* \*

"In modern times the practice of having special contracts has been superimposed on the custom of the realm. These contracts contain exceptions. If the carrier pleads an exception, the goods-owner may counter by pleading the fault of the carrier, but the onus of proving that, as also of proving an allegation of unseaworthiness, is, as I have already explained, on the goods-owner who makes it."

## I I .

When a vessel puts to sea on a voyage and is never heard from thereafter, there is no presumption in law that her disappearance was due to unseaworthiness. Without any proof from her owner that the loss was *not* due to unseaworthiness, the fact-finder may base upon the facts of sailing and disappearance an inference of fact that the loss was due to perils of the sea.

*Brown v. Neilson* (1804) 1 Caines (N. Y.) 525;  
*Gordon v. Boune*, (1807) 2 Johns (N. Y.) 150;  
*Houston v. Thornton* (Nisi Prius 1816) Holt,  
 242;

*Watson v. King* (Nisi Prius 1815) 1 Stark 121;  
*Tuamloa v. Oswin* (Nisi Prius) 2 Campbell 85;  
*Green v. Brown* (Kings Bench) 2 Strange 1199;  
*Koster v. Reed* (Kings Bench 1816) 6 Barne-  
 wall & Cresswell 19.

Or, when a vessel disappears in times of war and in areas of enemy activities, the fact-finder may reach an inference of fact that the loss was due to a war risk.

*Monro Brice & Co. v. Marten* [1920] 3 K. B. 94;  
*Macbeth & Co. v. King* (1916) 32 Times Law  
 Reports, 581;  
*Euterpe Steamship Co. v. North of England P.  
 & I. Assoc.* (1917) 33 Times Law Reports, 540.

## I I I .

The foregoing authorities, together with those cited in respondent's original brief, show that the courts in this country and in England have adhered uniformly to the following principles:

There is not any presumption in law that the sinking of a vessel is due to unseaworthiness.

Unseaworthiness as the cause of the sinking must be proven by him who asserts it.

A "presumption" of unseaworthiness, such as is in controversy here, is merely a rational inference of fact, to be drawn by the fact-finder, if at all, upon all the evidence in the case.

Such an inference may be drawn when all the facts point to unseaworthiness as the only rational explanation of the sinking. If the facts offer an alternative explanation and leave the fact-finder in doubt as to the true cause, unseaworthiness is not proven and the burden of proof is not sustained.

Judge Learned Hand, basing the opinion of the Circuit Court of Appeals in the present case upon the foregoing principles, carefully distinguished between the rational inference which is involved and a true "presumption". (R. 297).

The general principles summarized above are not affected by those cases in which common carriers, who are insurers, can avail themselves of statutory defenses only upon proof of seaworthiness, or due diligence, as a condition precedent to the relief granted by the statute. Such cases do not turn upon any inference or presumption, but upon the statutory provisions. If the cases cited by petitioner are examined with that distinction in mind, it will

be found that they do not conflict with, but support, the general principles summarized above.

Those principles apply to a private carrier, such as respondent admittedly was.

### CONCLUSION.

THE DECREES OF THE LOWER COURTS SHOULD BE AFFIRMED.

Respectfully submitted,

ROBERT S. ERSKINE,

CLETUS KEATING,

L. DE GROVE POTTER,

RICHARD SULLIVAN,

Counsel for Respondent.

New York, N. Y.,

October 10th, 1941.





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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1940

No. 584

14

COMMERCIAL MOLASSES CORPORATION,

*Petitioner,*

*vs.*

NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

**PETITION FOR REHEARING**

T. CATESBY JONES,  
*Counsel for Petitioner.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1940

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COMMERCIAL MOLASSES CORPORATION,  
*Petitioner,*  
*vs.*

NEW YORK TANK BARGE CORPORATION, as  
Chartered Owner of the Tank Barge "T. N. No. 73",  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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**PETITION FOR REHEARING**

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

Your petitioner, Commercial Molasses Corporation, respectfully presents this, its petition for rehearing in the above entitled cause or, in the alternative, its application under General Rule XXXIII of this Court for an extension of time within which to file a petition for rehearing in this Honorable Court in the above entitled cause and, in support thereof, presents the following:

**Introduction**

Your petitioner, the owner of a cargo of molasses which was laden on board the tank barge "T. N. No. 73" and which sustained serious damage as the result of the sinking

of that barge in the slip at Pier 1, Hoboken, New Jersey, on October 24, 1937, filed its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit and brief in support thereof with this Court on November 20, 1940 (R. 299). Said petition was granted by order of this Court filed December 16, 1940 (R. 299). Thereafter, briefs having been filed by both parties, oral argument was heard by this Court on March 14th and 15th, 1941. On April 14, 1941, this Court entered herein an order reading "Per Curiam: The judgment is affirmed by an equally divided court."

### **The Questions Involved in This Case and the Grounds for Rehearing or for an Extension of Time**

This case presents for decision two separate and distinct questions of law of general interest to all persons engaged in carrying, insuring and dealing in cargoes carried by water. Both are of fundamental importance and, we respectfully submit, should be authoritatively decided by this Court to insure the proper and uniform interpretation of the admiralty law by the Federal Courts in the various Circuits. We assume that the writ of certiorari was granted to accomplish that purpose.

The first of the two fundamental points of law here involved concerns the question as to the scope of, and the effect to be given to, the presumption of unseaworthiness which has long been recognized to arise when a vessel sinks in smooth water without adequate external cause. The Circuit Court of Appeals for the Second Circuit in the case at bar recognized the existence of this presumption, but held that it was not a continuing presumption and was not sufficient to justify a decree in favor of a cargo owner in an action based upon the breach of the shipowner's express warranty of seaworthiness even though the shipowner had failed to adduce satisfactory proof even to enable the Trial Court to find as a fact that the shipowner's attempted or suggested explanation actually existed. In so holding, the Circuit Court of Appeals reversed the ruling of the District

Court. The effect of its decision "by approving resort to mere conjecture as to the cause of the" sinking operated to "relax the important and salutary rule in respect of seaworthiness" (*The Edwin I. Morrison*, 153 U. S. 199, 215), a rule long recognized and enforced by the admiralty courts of both England and this country. As pointed out both in our brief in support of our petition for certiorari (pp. 18-26) and in our subsequent brief on the hearing by this Court (pp. 27-35), this ruling by the Circuit Court of Appeals for the Second Circuit was in square conflict with decisions of the Circuit Courts of Appeals for the Third, Fourth, Fifth and Ninth Circuits. See in particular *S. C. Loveland Co. v. Bethlehem Steel Co.*, 33 F. (2d) 655 (C. C. A. 3rd), where the legal situation was identical with that which existed here.

The second of the two separate and distinct points of law presented in this case (it was designated in the petition for a writ of certiorari herein as No. 4 of "The Questions Presented in the Petition"—Petition p. 10) is whether a charter party provision to the effect that the cargo owner shall insure the goods for the account of the carrier and that the vessel shall not be liable for any loss in respect of which insurance has been or could have been effected operates to cancel an express and unconditional warranty of seaworthiness contained in the same charter party. The District Court, although ruling that the loss was due to unseaworthiness, held that the vessel owner was excused by such a clause from liability for such loss. The Circuit Court of Appeals for the reasons stated in its opinion did not rule upon this point (R. 297). The importance of this question is, however, manifest. The decision herein on this question is in conflict with the general principles laid down in prior decisions of this Court (see particularly *Cullen Fuel Co. v. W. E. Hedger, Inc.*, 290 U. S. 82, 88; *The Carib Prince*, 170 U. S. 655, 659; *The Caledonia*, 157 U. S. 124, 137) and with rulings in other Circuits (see particularly *The Framlington Court* (C. C. A. 5), 69 F. (2d) 300, 303-4). It is also directly contrary to the ruling of the House of Lords in

*Nelson Line, Ltd. v. James Nelson & Sons, Ltd.*, 1908 A. C. 16, affirming (1907) 1 K. B. 769 (C. A.).

We respectfully submit that, if the case is left as it now stands, it will be the source of great confusion.

The District Court, although it held that the vessel owner was liable for the loss of your petitioner's cargo caused by the vessel's sinking due to unseaworthiness, exonerated it from all liability (R. 265) because of the terms of the insurance clause in the charter party. The Circuit Court of Appeals affirmed the decree of the District Court (R. 297), but did so on the sole and specific ground that the presumption of unseaworthiness did not suffice to establish that the loss had been caused by the vessel's unseaworthiness. The *per curiam* order of this Court, dated April 14, 1941, merely provides that "the judgment is affirmed by an evenly divided court."

Obviously, on the two important questions of law presented by the case, a conflict of law between the various Circuits continues to exist. The importance of settling conflicts between the Circuits has been emphasized by this Court in its Rule 38, Sec. 5 b. That the principle underlying this rule is particularly applicable to the Maritime Law is illustrated by the following decisions of this Court: *The Lottawanna*, 21 Wall. 558; *Queen Ins. Co. v. Globe & Rutgers Ins. Co.*, 263 U. S. 487; *Knickerbocker Ins. Co. v. Stewart*, 253 U. S. 149, 160; *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *The Thomas Barlum*, 293 U. S. 15, 43, 44 and the cases there cited.

When a new Justice has been appointed to fill the vacancy now existing on this Court, a decision can be made which will authoritatively state the views of this Court on the two points of law here involved, and thus put an end to the present conflict between the various Circuits.

Wherefore, your petitioner respectfully prays that its petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, reversed or, in the alternative,

that the time within which a petition for rehearing in the above entitled cause may be filed in this Honorable Court be extended to and including a period two weeks subsequent to the filling of the vacancy now existing in this Court.

Respectfully submitted,

T. CATESBY JONES,  
*Counsel for Commercial Molasses  
Corporation, Petitioner.*

### **Certificate of Counsel**

I, T. CATESBY JONES, counsel for the above-named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

T. CATESBY JONES,  
*Counsel for Petitioner.*

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op. 7, 8

# SUPREME COURT OF THE UNITED STATES.

No. 14.—OCTOBER TERM, 1941.

Commercial Molasses Corporation, Petitioner, vs. New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 73".	}	On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the Second Circuit.
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[November 17, 1941.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a proceeding in admiralty originating in the District Court upon a petition by respondent as chartered owner of the tank barge "T.N. No. 73", for limitation of liability for damage to petitioner's shipment of molasses resulting from the sinking of the barge in New York harbor.

Petitioner, the sole claimant in the limitation proceeding, filed, in behalf of the insurer, its claim for loss of the molasses on the barge, which sank on Oct. 23, 1937, while taking on the shipment from the S. S. "Albhel Sultan". The barge sank in smooth water, without contact with any other vessel or external object to account for the sinking. By the contract of affreightment with petitioner's predecessor in interest, extended to cover the year 1937, respondent undertook to transport the molasses by barges in New York harbor from vessels or tidewater refineries to the shipper's customers and agreed that the barges are "tight, staunch, strong and in every way fitted for the carriage of molasses within the limits above mentioned and [respondent] will maintain the barges in such condition during the life of this contract." The contract also contained an undertaking on the part of the shipper of the molasses to effect insurance on cargoes for the account of respondent, the breach of which, it is contended, operated to relieve respondent from liability for any unseaworthiness of the barge.

The "T. N. No. 73" was a steel tank barge with four cargo tanks, two forward and two aft, separated by bulkheads, one extending fore and aft and the other athwartship. It had a rake fore and aft beginning 23 inches below the deck, affording space for fore

and aft peak tanks. The customary method of stowing the barge was to pump the molasses into the forward tanks until the barge had a specified freeboard, then into the stern tanks until the stern had another specified freeboard, then back into the forward tanks until the barge was trimmed fore and aft.

In the case of the present shipment the customary procedure was followed and the molasses was first pumped into the forward and then into the after tanks at a rate of from 3 to 3½ tons a minute. When the stern had approximately the desired freeboard the mate of the barge went forward to open the valves of the discharge pipes connecting with the forward tanks so as to fill them sufficiently to trim the barge fore and aft. On his way he stopped for a short time, the length of which was not precisely fixed, to carry on a conversation with some of the men on the vessel lying alongside. When he reached the valves for the forward tanks and before the valves for the after tanks had been closed, the barge sank by the stern. Only a small part of the molasses was saved and the value of that lost largely exceeded the value of the barge after salvage operations.

Respondent attributed the sinking to overloading of the after tanks resulting from the mate's delay in shifting the flow of the molasses from the stern to the forward tanks. If, as alleged, over-filling of the stern tanks caused the loss without the privity or knowledge of respondent, it could limit liability. R. S. § 4283, 46 U. S. C. § 183; *La Bourgogne*, 210 U. S. 95, 122; *The George W. Pratt*, 76 F. (2d) 902. But it was unnecessary to decide any question of limiting liability unless petitioner, the sole claimant, succeeded in establishing its claim.

On the issues thus presented the District Court heard a great deal of testimony by witnesses who testified to all the circumstances attending the loading and sinking of the barge, and by experts as to its theoretical load capacity and the probable disposition of its load at the time the barge sank. There was also much evidence bearing on the seaworthiness of the vessel. This included the testimony of a representative of the cargo interests who had inspected the barge just before she began to receive the molasses and had found the tanks dry and clean, and who admitted he had found no evidence of leakage. There was also testimony by a diver who had examined the barge while she was on the bottom, and of others who had examined her condition after she had been raised and placed in dry dock.

After a careful review of all the evidence the trial judge found that it was not sufficient to establish the fact that the sinking was caused by overloading the after tanks. He also found as a fact that upon all the evidence "the cause of the accident has been left in doubt". From all this he concluded that respondent was chargeable upon its warranty of seaworthiness by reason of the "presumption" of unseaworthiness arising from the unexplained sinking of the barge which would deprive the owner of the right to limit liability. But as he thought the insurance clause in the contract of affreightment required petitioner to effect cargo insurance for account of respondent, which it had failed to do, he dismissed petitioner's claim. 1939 A. M. C. 673.

The Court of Appeals affirmed, 114 F. (2d) 248, but for a different reason than that assigned by the trial judge for his decision. It held that the burden was on petitioner to prove that respondent had furnished an unseaworthy barge. The court sustained the trial court's finding which it interpreted as meaning "that the evidence whether or not the barge sank because of unseaworthiness was so evenly matched that the judge could come to no conclusion upon the issue." But it held that the "presumption of unseaworthiness", which would arise from the evidence of the sinking of the barge in smooth water without any other apparent or probable cause, did not survive the further proof which left in doubt the issue of the cause of the loss. The court accordingly held that petitioner had not sustained its burden. It thus became unnecessary to consider what burden would rest on the barge owner if he were seeking to limit liability on an admittedly valid claim. We granted certiorari, 311 U. S. 643, to resolve an alleged conflict of the decision below with those of other circuit courts of appeals. *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180; *The John Twohy*, 279 Fed. 343; *Loveland Co. v. Bethlehem Steel Co.*, 33 F. (2d) 655; *Gardner v. Dantzer Lumber & Export Co.*, 98 F. (2d) 478; cf. *The Edwin I. Morrison*, 153 U. S. 199, and because of the importance in the maritime law of the principle involved.

With respect to the burden of proof, this case is to be distinguished from those in which the burden of proving seaworthiness rests upon the vessel when it is a common carrier or has assumed the obligation of a common carrier. The present contract of affreightment was for private carriage in New York harbor: *The Fri*, 154 Fed. 333; *The G. R. Crowe*, 294 Fed. 506; *The Wild-*

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*enfels*, 161 Fed. 864; *The C. R. Sheffer*, 249 Fed. 600; *The Lyra*, 255 Fed. 667; *The Nordhvalen*, 6 F. (2d) 883, and thus gave to respondent the status of a bailee for hire of the molasses. *Southern Ry. v. Prescott*, 240 U. S. 632, 640; *Kohlsaat v. Parkersburg & M. Sand Co.*, 266 Fed. 283; *Alpine Forwarding Co. v. Pennsylvania Railroad*, 69 F. (2d) 734; *Gerhard & Hey, Inc. v. Cattaraugus T. Co.*, 241 N. Y. 413. Cf. *The Nordhvalen*, *supra*, 887. Hence we are not concerned with the rule that one who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking, or for which it permits him to stipulate. The burden rests upon him to show that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary "bailee" but because he is a special type of bailee who has assumed the obligation of an insurer. *Schnell v. The Vallescura*, 293 U. S. 296, 304, and cases cited. See *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

For this reason the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or because he is a common carrier or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel. *The Edwin I. Morrison*, *supra*, 211; *The Majestic*, 166 U. S. 375; *Schnell v. The Vallescura*, *supra*; *The Beeche Dene*, 55 Fed. 525. Cf. 39 Stat. 539, 49 U. S. C. § 88; Uniform Bill of Lading Act, § 12. See IX Wigmore on Evidence (3rd ed.) § 2508 and cases cited. And in that case, since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception. *The Folmina*, 212 U. S. 354, 363; *Schnell v. The Vallescura*, *supra*, 306, 307. A similar rule is applied under the Harter Act, which gives to the owner an excuse for unseaworthiness, if he has exercised due care to make his vessel seaworthy, for there the burden rests upon him to show that he has exercised such care. *The Wildcroft*, 201 U. S. 378; *The Southwark*, 191 U. S. 1, 12; *May v. Hamburg etc. Gesellschaft*, 290 U. S. 333, 346.

But as the court below held, the bailee of goods who has not assumed a common carrier's obligation is not an insurer. His under-

taking is to exercise due care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner. In such a case the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks, *Southern Ry. v. Prescott*, *supra*; *Kohlsaat v. Parkersburg & M. Sand Co.*, *supra*; *The Transit*, 250 Fed. 71, 72, 75; *The Nordhvalen*, *supra*; *Delaware Dredging Co. v. Graham*, 43 F. (2d) 852, 854; *Alpine Forwarding Co. v. Pennsylvania Railroad*, *supra*, 736; *Gerhard & Hey, Inc. v. Cattaraugus & Co.*, *supra*; Story on Bailments (8th ed.) §§ 501, 504, 410, 410a; Wigmore, *op cit.*, *supra*, § 2508 and cases cited, as it did upon petitioner here when it alleged the breach of warranty as the basis of its claim. Petitioner apparently does not challenge the distinction which for more than two centuries since *Coggs v. Bernard*, *supra*, has been taken between common carriers and those whom the law leaves free to regulate their mutual rights and obligations by private arrangements suited to the special circumstances of cases like the present. Nor do we see any adequate grounds for departing from it now or for drawing distinctions between a private bailment of merchandise on a barge in New York harbor and of goods stored in a private warehouse on the docks. Neither bailee is an insurer of delivery of the merchandise; both are free to stipulate for such insurance or for any lesser obligation, in which case the bailor cannot recover without proof of its breach.

The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence, and in determining whether petitioner has sustained the burden the question often is, as in this case, what inferences of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss which it is alleged is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. *The Northern Belle*, 9 Wall. 526, 529; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 54 Fed. 481, 483; *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180; *The Nordhvalen*, *supra*, 886. If the bailee fails it leaves the trier of fact free to draw an inference unfavorable to him upon the bailor's establishing the unexplained failure to deliver the goods

safely. *Southern Ry. v. Prescott*, *supra*; cf. *The America*, 174 Fed. 724.

Whether we label this permissible inference with the equivocal term "presumption" or consider merely that it is a rational inference from the facts proven, it does no more than require the bailee, if he would avoid the inference, to go forward with evidence sufficient to persuade that the non-existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start. *Southern Ry. v. Prescott*, *supra*; *Kahlsaat v. Parkersburg & M. Sand Co.*, *supra*; *Tomkins C. S. Co. v. Bleakley T. Co.*, 40 F. (2d) 249; *Pickup v. Thames Insurance Co.*, 3 Q. B. D. 594. Cf. *Del Vecchio v. Bowers*, 296 U. S. 280; Wigmore, *op cit.*, *supra*, §§ 2485, 2490, 2491, and cases cited.

Proof of the breach of warranty of seaworthiness stands on no different footing. The trier of fact may in many situations infer the breach from the unexplained circumstance that the vessel, whether a common or private carrier, sank in smooth water. See *The Edwin I. Morrison*, *supra*; *Werk v. Leathers*, 97 U. S. 379, 380; *The Harper No. 115*, 42 F. (2d) 161; *The Jungshoved*, 290 Fed. 733; *Barnewall v. Church*, 1 Caines 217, 234; *Walsh v. Washington Marine Insurance Co.*, 32 N. Y. 427, 436; *Zillah Transportation Co. v. Aetna Ins. Co.*, 175 Minn. 398; and cases cited below, 114 F. (2d) 248, 251; Scrutton on Charter Parties and Bills of Lading (14th ed.) 105. Whether in such circumstances the vessel has the status of a private bailee is of significance only in determining whose is the burden of persuasion. Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve. *The Edwin I. Morrison*, *supra*, 212; *The Folmina*, *supra*, 363; *Schnell v. The Vallescura*, *supra*. The English courts, after some obscurity of treatment, see *Watson v. Clark*, 1 Dow 336, have reached the same conclusion. *Pickup v. Thames Insurance Co.*, 3 Q. B. D. 594; *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co.*, [1901] A. C. 362, 366; *Lindsay v. Klein*, [1911] A. C. 194, 203, 205; see *Constantine S. S. Line v. Imperial Smelting Corp.*, [1911] 2 All. Eng. 165, 191-92.

Proof of the sinking of the barge aided petitioner, but did not relieve it from sustaining the burden of persuasion when all the evidence was in. This Court, in the case of private bailments, has given like effect to the rule that the unexplained failure of the bailee to return the bailed goods is prima facie evidence of his breach of duty, *Southern Ry. v. Prescott*, *supra*, 40, and cases cited; see *Chesapeake & Ohio Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416, 422, and the lower federal courts have applied, correctly we think, the same rule with respect to proof of unseaworthiness by the shipper where the vessel has not assumed the obligation of a common carrier. *Kohlsaat v. Parkersburg & M. and Co.*, *supra*, 285; *Robert A. Munroe Co. v. Chesapeake Light-ship Co.*, 283 Fed. 526; *The Nordhvalen*, *supra*; *Tomkins C. S. Co. v. Bleakley T. Co.*, *supra*; *Delaware Dredging Co. v. Graham*, *supra*, 54. This is but a particular application of the doctrine of *res ipsa loquitur*, which similarly is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care but does not avoid the requirement that upon the whole case he must prove the breach by the preponderance of evidence. *Sweeney v. Irving*, 28 U. S. 233.

*The Edwin I. Morrison* calls for no different result. Here this Court reversed the findings of the lower court on the ground that the explanation offered for damage to the cargo by seawater taken in through a defective bilge pump hole, was only a conjecture supported by no direct testimony and was not sufficient to sustain the burden of the shipowner to prove that the vessel was seaworthy, saying (p. 212): "If the determination of this question is left in doubt, that doubt must be resolved against" the shipowner. See *The Dunbritton*, 73 Fed. 352, 358; *The Alvina*, 74 Fed. 252, 255. The court below had found that the bill of lading signed by the master-owner undertook to deliver the shipment in "good order and condition", the "dangers of the sea excepted". No exception was taken to this finding and in this Court the shipper's contention that such was the contract was not challenged by the owner. The opinion must be taken as proceeding, as in *The Folmina* and *Schnell v. The Vallescura*, *supra*, on the ground that the case was one in which the obligation assumed was that of a common carrier on whom the burden rests of proving that the cargo loss is not due to unseaworthiness. The expressions in the opinion, as to the burden of proof which the shipowner must carry in order to

8      *Commercial Molasses Corp. vs. N. Y. Tank Barge Corp.*

bring him within the exception of perils of the sea<sup>2</sup> have been cited in the only instances when approved by this Court, as relating to the burden of proof on those who have assumed the obligations of common carriers. See *The Majestic*, *supra*, 386; *The Fulmine*, *supra*, 363; *Schnell v. The Vallescura*, *supra*, 305.

Here petitioner relied on the inference to be drawn from the unexplained sinking of the barge to sustain its burden of proving unseaworthiness. But the evidence did not stop there. To rebut the inference, respondent came forward with evidence fully disclosing the circumstances attending the sinking. Inspection of the barge before the loading began and after she sank, and again after she was raised, failed to disclose any persuasive evidence of unseaworthiness. The method and circumstances of her loading at least tended to weaken the inference which might otherwise have been drawn that the sinking was due to unseaworthiness rather than fault in stowing the cargo. Upon an examination of all the evidence of which the sinking, without any proven specific cause, was a part, the two courts below have found that no inference as to the cause of sinking can be drawn. Petitioner has thus failed to sustain the burden resting on it.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

# SUPREME COURT OF THE UNITED STATES.

No. 14.—OCTOBER TERM, 1941.

Commercial Molasses Corporation, Petitioner, vs. New York Tank Barge Corporation, as Chartered Owner of the Tank Barge "T. N. No. 73".	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
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[November 17, 1941.]

Mr. Justice BLACK, dissenting.

It has long been recognized that "courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity." *O'Brien v. Miller*, 168 U. S. 287, 297. Where, as here, the result of a case in admiralty is made to turn upon the distinction between a common and private carrier, we may well ask whether more respect has been paid to technical niceties of the common law than befits the admiralty tradition. Cf. *The Confiscation Cases*, 20 Wall. 92, 105-106, 107. I do not deny that in many situations the distinction may be important nor that legislatures and courts may be compelled from time to time to resurvey the changing line of separation. But here, I am convinced, the distinction is irrelevant to a just disposition of the case before us.

In the opinion just announced, the burden of proving seaworthiness is tied up with a common carrier's obligations as an insurer. But in *Schnell v. The Vallescura*, 293 U. S. 296, although the defendant was a common carrier on whom it was held such a burden lies, no suggestion that the Court rested its result upon the peculiar obligation of the defendant as an insurer can be found in the opinion. And so far as appears from the briefs and arguments of counsel as well as the majority opinion here, it would seem that this Court has never before given the insurer's liability of common carriers as the reason for the heavy burden of proof they bear in admiralty cases of this type. On the contrary, the basis usually given for the rule is the one explicitly stated in *Schnell v. The Vallescura*, *supra*, at page 304:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

It is difficult to see any persuasive reason for concluding that the rule as thus explained is any less appropriately applied to private carriers than to common carriers. In both cases the shipper normally has no representative on board the ship, the master and crew being employees of the carrier, with the result that the difficulties encountered by the shipper in seeking to find out how the loss occurred are equally great. See Carver, *Carriage of Goods by Sea* (8th ed.) 9.

I have found no language in the opinions of this Court in cases holding the burden of proof of seaworthiness rests on a common carrier that even suggests, not to say compels, the inference that a different result would have been reached if the carrier had been a private one. Hence, if the question of this case were one of original impression, I should see no obstacle to a holding that would give to the shipper here, who clearly had no easier access to evidence than did the shipper in the *Vallescura* case, the benefits of a similar allocation of the burden of proof.

But the question is not one of original impression. In *The Edwin I. Morrison*, 153 U. S. 153, this Court held that the burden was on a *private* carrier to prove seaworthiness in a controversy distinguishable in no significant respect from that now before us. The opinion of the Court here has suggested that the finding by the Circuit Court in the *Morrison* case that the bill of lading stated that the carrier would deliver the shipment "in good order and condition" amounted to a finding that the carrier had by contract assumed additional obligations, i.e., those of a common carrier. Hence, the Court sees in that decision nothing more than the reiteration of the proposition that a *common carrier* has the burden of proving seaworthiness and finds in it no indication of what the burden of a private carrier should be.

It may seriously be questioned whether the finding that the bill of lading contained the casual phrase just quoted can properly be interpreted as a finding of a contract to assume the peculiar lia-

bilities (whatever they may have been) of a common carrier. But even on the assumption that the Court's interpretation of the finding is correct, its interpretation of the basis of decision in the *Morrison* case seems clearly erroneous. Nowhere in that opinion is there the smallest suggestion that the carrier was regarded as having bargained itself into a position of special liability. If the Court had believed a distinction must be made between private and common carriers, I should suppose it would have been explicit in stating that this carrier, although a private carrier, had assumed the obligations of a common carrier by contract. I think it inconceivable that it would have left a fact of such significance to be deduced from an inconspicuous phrase in the findings of the Circuit Court set out in a footnote to the "Statement of the Case" seven pages before the opinion itself begins. *The Edwin I. Morrison*, *supra*, 203, n. 1.

In *The Lottawanna*, 21 Wall. 558, 571, Mr. Justice Bradley stated: "If . . . with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any considerations of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law." In the "received law" of this Court, at least since 1894, when the *Morrison* case was decided, no distinction has been drawn between private and common carriers with reference to the burden of proving seaworthiness. If such a distinction had existed, the "new lights" shed by the awareness of ever increasing complexity in modern shipping, a complexity equally incomprehensible to the shipper whether he deals with a private or common carrier, could, perhaps not without propriety, have been taken by this Court as a reason for erasing it. But the contrary procedure, of establishing a distinction which neither was present in our received law nor is demanded "to preserve harmony and logical consistency", seems wholly unjustifiable.

Accordingly, it is my opinion that the judgment below should be reversed.

Mr. Justice DOUGLAS, Mr. Justice MURPHY, and Mr. Justice BYRNES concur in this opinion.